Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

ILLINOIS STATE UNIVERSITY, *et al.*,

Petitioners,

v.

DR. IRIS I. VARNER, *et al.*,

Respondents,

and

UNITED STATES OF AMERICA,

Intervenor-Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Equal Pay Act constitute a valid abrogation of the Eleventh Amendment to the Constitution of the United States?

PARTIES TO THE PROCEEDING

The Petitioners in this case are Illinois State University, The Board of Regents, Robert W. Jefferson, David Strand, John K. Urice, Thomas P. Wallace, David T. Murphy, Carol K. Burns, Joseph B. Ebbesen, Carl E. Kasten, Nancy J. Masterson, Patricia A. McKenzie, James W. Myles, Barbara Scheibling, Niranjan Shah and William Sulaski, individually and in their capacities as members of The Board of Regents (collectively referred to herein as "ISU," the "University" or the "State of Illinois"). The Respondents are Dr. Iris I. Varner, Dr. Teresa M. Palmer and Dr. Paula J. Pomerenke, on their own behalf and on behalf of all other persons similarly situated (collectively referred to herein as "Plaintiffs"). The United States Department of Justice has intervened in this matter as a Respondent.

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PETITION FOR A WRIT OF CERTIORARI

ISU hereby respectfully petitions this Court to issue a writ of certiorari for review of the ruling of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

This matter was on remand to the United States Court of Appeals for the Seventh Circuit, following this Court's grant of ISU's original petition for a writ of certiorari. *See* Appendix ("App.") at 21a. The opinion of the court of appeals on remand is reported at 226 F.3d 927 (7th Cir. 2000). *See* App. at 1a. The earlier opinion of the court of appeals is reported at 150 F.3d 706 (7th Cir. 1998). *See* App. at 23a. The Order of this Court granting ISU's prior petition for a writ of certiorari is reported at 528 U.S. 1110 (2000). *See* App. at 21a.

The previous opinions of the district court are reported at 972 F. Supp. 458 (C.D. Ill. 1997) and 986 F. Supp. 1107 (C.D. Ill. 1996), respectively. *See* App. at 53a and 77a. The Magistrate Judge's Report and Recommendation is not reported. *See* App. at 68a. The November 8, 2000 Order of the court of appeals denying ISU's request for rehearing and suggestion for rehearing *en banc* is also not reported. *See* App. at 88a.

JURISDICTION

The judgment of the court of appeals on remand was entered on September 6, 2000. *See* App. at 1a. On November 8, 2000, the court of appeals denied ISU's request for rehearing and suggestion for rehearing *en banc*. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions relevant to this petition are set forth below. The Eleventh Amendment to the United States Constitution provides as follows:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONST. amend. XI. The Fourteenth Amendment to the United States Constitution provides in pertinent part as follows:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due

> process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. CONST. amend. XIV, §§ 1, 5. Finally, the forum selection clause of the Equal Pay Act, 29 U.S.C. § 206(d)(1), which is itself derived from the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-216, provides in pertinent part as follows:

> An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.

29 U.S.C. § 216(b). The Equal Pay Act and the relevant portions of the FLSA are reprinted in the Appendix. *See* App. at 89a-92a.

STATEMENT OF THE CASE

The prior proceedings in the district court, the court of appeals and this Court are discussed below.

A. Proceedings In The District Court

On their own behalf and on behalf of all other persons similarly situated, Plaintiffs filed this suit on March 13, 1995 against ISU and various of its officers and

regents, alleging violations of the Equal Pay Act and seeking from ISU money damages as well as injunctive relief. On April 15, 1996, the district court certified a class that consists of all female faculty members at ISU from 1982 to the present.

Following this Court's decision in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), ISU moved to dismiss on Eleventh Amendment grounds the claims made by Plaintiffs under the Equal Pay Act. The United States Department of Justice was subsequently granted leave to participate in the district court proceedings, and on July 30, 1997, the district court denied ISU's motion. *See* App. at 53a. ISU filed its notice of appeal on August 28, 1997.

B. Initial Proceedings In The Court Of Appeals

Briefing was completed before the court of appeals on the initial appeal on January 15, 1998, and oral argument took place on February 26, 1998. *See* App. at 23a. On July 21, 1998, the court of appeals issued its initial opinion in this matter, affirming the district court. *See id.*

The court of appeals concluded in its initial opinion that in enacting the Equal Pay Act, Congress was presented with substantial evidence of gender discrimination in private industry and that Congress had therefore acted within the scope of its Fourteenth Amendment authority in seeking to abrogate Eleventh Amendment immunity. *See* App. at 32a-48a. The court of appeals, however, made no finding that existing federal and state remedies were insufficient or that abrogation was necessary to protect the constitutional rights of women. *See id.*

Moreover, by relying exclusively upon evidence of private discrimination, the court of appeals acknowledged that Congress had been presented with no evidence of discrimination by the States themselves, notwithstanding the fact that the issue of Eleventh Amendment immunity only implicates discrimination by the States. *See id.* at 45a-46a. Finally, the court of appeals acknowledged that the other courts of appeals were in "disarray" with respect to their analyses of Eleventh Amendment immunity. *See id.* at 44a-45a.

On September 4, 1998, ISU filed with the court of appeals a request for rehearing and a suggestion for rehearing *en banc*. ISU's request was denied without opinion on October 13, 1998. *See* App. at 22a.

C. ISU Seeks A Writ Of Certiorari From This Court

On January 13, 1999, ISU filed with this Court a petition for a writ of certiorari. *See* App. at 121a. ISU argued in that petition that the Equal Pay Act did not properly abrogate the Eleventh Amendment immunity of the States. *See id.* Specifically, ISU argued that neither the abrogation provision of the Equal Pay Act nor its liability provisions could be justified as congruent and proportional legislation under Section 5 of the Fourteenth Amendment. *See id.*

ISU's petition was granted by this Court on January 18, 2000. *See* App. at 21a. In granting ISU's petition, this Court vacated the prior judgment of the court of appeals and remanded the matter for further proceedings in light of this Court's intervening decision in *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000). *See id.*

In *Kimel*, this Court held that the Age Discrimination in Employment Act ("ADEA") did not constitute a proper abrogation of Eleventh Amendment immunity. *See Kimel*, 528 U.S. at 81-83. Specifically, this Court concluded that the ADEA failed the "congruence and proportionality" test previously established in *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997). *See id.*

In making its ruling in *Kimel*, this Court relied upon the facts that: (1) the ADEA prohibits constitutional state action and (2) Congress never identified a pervasive pattern of age discrimination by the States in enacting the ADEA. *See Kimel*, 528 U.S. at 82-92. In short, this Court found that there was no reason to believe that the ADEA was necessary to prevent unconstitutional discrimination. *See id.* at 91.

D. The Decision Of The Court Of Appeals On Remand

On remand, briefing was completed on an expedited schedule, and oral argument (which was also expedited) was held on May 31, 2000. As it had before, ISU again argued that the Equal Pay Act did not and could not constitute a proper abrogation of Eleventh Amendment immunity. Specifically, ISU argued as follows: (1) the Equal Pay Act prohibits constitutional conduct by the States; (2) in enacting the Equal Pay Act, Congress never made any findings nor heard any evidence that the States were engaging in *any* gender discrimination, much less recent and widespread patterns of discrimination; (3) similarly, Congress made no findings nor heard any evidence that existing state and federal remedies (*e.g.*,

Title VII) were inadequate to protect women against intentional gender discrimination; and (4) no evidence was ever presented to Congress that the state courts were not fully capable of providing adequate forums for alleged discrimination by the States and their instrumentalities.

In its panel opinion, the court of appeals essentially conceded each of the points raised by ISU. *See* App. at 10a-11a, 16a-17a. The court of appeals acknowledged that the Equal Pay Act "prohibit[s] at least some conduct that is constitutional. . . . " *See id.* at 11a. It further noted that "the legislative record of the Equal Pay Act itself is devoid of any explicit findings as to the problem of gender discrimination by states. . . . " *See id.* at 16a-17a. Similarly, the court of appeals did not contest the fact that in enacting the Equal Pay Act, Congress was presented with no evidence that existing state and federal remedies such as Title VII are in any way insufficient for the protection of women's rights. *See id.* at *passim*. Finally, the court of appeals identified no evidence that the States were somehow thwarting the effectiveness of these other existing remedies or that state forums were in any way inadequate. *See id.* Indeed, the court of appeals never even asked (much less answered) the question of whether the inclusion of extra-constitutional remedies against the States in the Equal Pay Act was actually necessary to protect women against unconstitutional gender discrimination. *See id.*

Nonetheless, the court of appeals concluded that abrogation was appropriate. *See* App. at 18a. To reach this conclusion, the court of appeals relied on three arguments. First, the court of appeals acknowledged that the

Equal Pay Act does proscribe some constitutional behavior but nevertheless found that the Act's liability standard does not significantly diverge from the constitutional definition of gender discrimination. *See id.* at 15a. Second, the court of appeals relied on the fact that gender is a suspect class, though it did not explain precisely how (if at all) this fact impacts the analysis required by *Boerne* and *Kimel*. *See id.* Finally, the court of appeals relied on "our Nation['s] . . . long and unfortunate history of sex discrimination," though the court of appeals admitted that Congress considered no evidence of discrimination by the States when the Equal Pay Act was extended to them. *See id.* at 17a.

On October 23, 2000, ISU filed with the court of appeals a request for rehearing and a suggestion for rehearing *en banc*, arguing that the opinion by the court of appeals conflicted with this Court's repeated admonitions that "prophylactic measure[s] taken under purported authority of §5 [must be] genuinely necessary to prevent violation of the Fourteenth Amendment." *See College Savings Bank v. Florida Prepaid*, 527 U.S. 666, 675 (1999). ISU further argued that the panel opinion conflicted with the court of appeals' own prior holding that Congress must have actually been presented with evidence that the remedy it has selected is necessary to "implement the core constitutional rule." *See Erickson v. Board of Governors*, 207 F.3d 945, 951 (7th Cir. 2000). ISU's request, however, was denied without opinion by the court of appeals on November 8, 2000.

REASONS FOR GRANTING THE WRIT

This is the second time this case has been before the Court. In the first iteration, this Court granted ISU's request for a writ of certiorari and remanded the matter back to the court of appeals. In its January 18, 2000 Order, this Court gave the court of appeals a clear directive to reconsider its earlier decision in light of the Court's intervening decision in *Kimel*. We respectfully submit that the court of appeals misapprehended *Kimel* and its predecessors and otherwise failed to follow this Court's directive.

In its recent panel opinion, the court of appeals held that Congress is free to abrogate Eleventh Amendment immunity and impose extra-constitutional measures upon the States even in the absence of any evidence that such legislation is necessary to enforce the actual terms of the Constitution. *See* App. at 1a-20a. The court of appeals further approved this legislation absent any evidence that existing state and federal remedies and forums are inadequate to protect the constitutional rights at issue and absent any evidence of a pattern of unconstitutional conduct by the States. *See id.* Indeed, the opinion of the court of appeals allows the imposition of an extra-constitutional remedy even if a perfectly effective federal remedy already exists that itself conforms precisely to the Fourteenth Amendment. *See id.*

As discussed more fully below, the decision of the court of appeals plainly conflicts with the relevant decisions of this Court and presents important questions of constitutional law that should be settled once and for all by this Court. The recent decisions of this Court have

repeatedly affirmed that extra-constitutional remedies (including abrogation) must be "congruent and proportional" and necessary to enforce the Constitution. *See College Savings Bank*, 527 U.S. at 675; *see also Kimel*, 528 U.S. at 88-91. The court of appeals, however, failed to identify any factors which would justify the conclusion that abrogation is necessary to protect the rights guaranteed by the Constitution. *See* App. at 1a-20a. As such, the ruling of the court of appeals is squarely inconsistent with previous decisions of this Court. Indeed, this Court has never suggested that abrogation is permissible absent evidence that it is actually necessary to enforce the Fourteenth Amendment. Instead, this Court has consistently performed a careful analysis to determine whether abrogation was necessary, an analysis that was unfortunately lacking in the recent decision by the court of appeals.

The practical implications of the ruling by the court of appeals are serious. Consistent with that ruling, the States face suit in federal court for claims brought under the Equal Pay Act, and they are being held liable under the Act for what amounts to constitutional conduct. More specifically, liability is being imposed upon the States without any showing of intentional discrimination, and state treasuries are being called upon to satisfy sizable judgments for money damages without any showing that the States have actually acted in a manner inconsistent with the Fourteenth Amendment. This is thus a serious issue, and the practical implications of the ruling by the court of appeals are yet another reason why certiorari should be granted again.

I. AS CONCEDED BY THE COURT OF APPEALS, THE EQUAL PAY ACT EXPANDS THE CONSTITUTIONAL DEFINITION OF DISCRIMINATION AND THUS CONSTITUTES EXTRA-CONSTITUTIONAL "PROPHYLACTIC" LEGISLATION, THEREBY REQUIRING SCRUTINY UNDER THE STANDARDS ESTABLISHED IN *BOERNE, KIMEL* AND *FLORIDA PREPAID*

It is undisputed that the Equal Pay Act expands the constitutional definition of discrimination and prohibits constitutionally-permissible conduct. *See* App. at 9a-12a. As this Court has made clear, invidious intent is the touchstone of unconstitutional discrimination. *See, e.g., Personnel Adm'r v. Feeney*, 442 U.S. 256, 274 (1979) (stating that it is "purposeful [gender] discrimination . . . that offends the Constitution"). Conversely, state action that merely has a disparate impact without discriminatory intent is not within the scope of the Fourteenth Amendment. *See id.* at 273.

A State, however, may be held liable under the Equal Pay Act without any showing of discriminatory intent. *See Stopka v. Alliance of Am. Insurers*, 141 F.3d 681, 685 (7th Cir. 1998) ("The Equal Pay Act does not require proof of discriminatory intent."). A state employer commits a prima facie violation of the Equal Pay Act in any instance where a woman is compensated differently from a man for any work "that requires equal skill, effort, and responsibility, and [which is] performed under similar working conditions." *See* 29 U.S.C. § 206(d)(1); App. at 9a (citing *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974)). Moreover, a State may not avoid liability by proving that it lacked discriminatory intent. *See* 29 U.S.C.

§ 206(d)(1); *see also, e.g., Corning Glass*, 417 U.S. at 196. Thus, any unexplained differences in pay between a man and a woman performing "similar" work give rise to liability against the State, irrespective of any intent or effort to actually discriminate. *See id.*

In fact, the States are required under the Equal Pay Act to make a substantial showing of "business" necessity with respect to any practice that results in different outcomes for employees of different genders. *See, e.g., Aldrich v. Randolph Central Sch. Dist.*, 963 F.2d 520, 525 (2d Cir. 1992); *Equal Employment Opportunity Comm'n v. J.C. Penney*, 843 F.2d 249, 253 (6th Cir. 1988); *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 876 (9th Cir. 1982). This standard, however, represents a substantial departure from the Fourteenth Amendment standard *actually adopted* by this Court in *Feeney*. *See Feeney*, 442 U.S. at 272-78. The *Feeney* decision requires a factual finding that *the purpose* of purportedly neutral state action was "based on gender" and was motivated by a "discriminatory purpose." *See id.* But if no intent to discriminate exists, there can be no violation of the Constitution. *See id.* at 272. The difference between the standards, therefore, could not be more stark. The Constitution regulates conduct while the Equal Pay Act regulates results. This difference – the difference between conduct and results – is the difference between equal protection of the laws and quotas.

In light of these precedents and the plain statutory scheme, the court of appeals openly acknowledged in its

panel opinion that the liability provisions of the Equal Pay Act are broader than the Constitution. *See* App. at 9a-11a, 45a; *see also Fallon v. Illinois*, 882 F.2d 1206, 1213 (7th Cir. 1989). The consequence of this acknowledgment should have been the careful analysis called for by *Boerne*, *Kimel* and *Florida Prepaid v. College Savings Bank*, 527 U.S. 627 (1999), concerning the need for abrogation. Unfortunately, that type of scrutiny simply did not occur in this case. Because the court of appeals ignored altogether the necessity of abrogation, its decision raises an important question of constitutional law.

II. THE COURT OF APPEALS DID NOT FOLLOW THIS COURT'S DIRECTIVE OR PRIOR PRECEDENTS

In recent years, this Court has decided a series of cases reaffirming the clear limits inherent in the power of Congress to abrogate Eleventh Amendment immunity. In *Seminole Tribe*, this Court held that Congress could only abrogate Eleventh Amendment immunity if it were necessary to protect the rights guaranteed by the Fourteenth Amendment. *See Seminole Tribe*, 517 U.S. at 59-73. The very next term, this Court again emphasized in *Boerne* the limits of Congress' power under the Fourteenth Amendment, holding that Congress had exceeded its Fourteenth Amendment authority when it imposed the Religious Freedom Restoration Act on the States. *See Boerne*, 521 U.S. at 511. The Court reiterated in *Boerne* that the legislative power of Congress under the Fourteenth Amendment is limited to enforcing violations of the Constitution. *See id.* at 524-29.

Following *Boerne*, this Court has drawn a sharp distinction in the abrogation context between Fourteenth Amendment legislation that merely provides remedies for constitutional violations and legislation that imposes extra-constitutional obligations on the States, including laws that expand the constitutional definition of "discrimination." *See, e.g., Kimel*, 528 U.S. at 83-84. As noted in *College Savings Bank*, "the term 'enforce' is to be taken seriously" and "the object of valid § 5 legislation must be the carefully deliminated remediation or prevention of constitutional violations." *See College Savings Bank*, 527 U.S. at 672. In other words, any extra-constitutional legislation that abrogates Eleventh Amendment immunity must be carefully examined to ensure that it is "congruent and proportional" to an "evil or wrong that Congress intended to remedy. . . . " *See Florida Prepaid*, 527 U.S. at 639-40 (internal quotations omitted).

This Court has, in turn, relied upon a number of factors in determining whether abrogation can be considered a "congruent and proportional" application of the enforcement power of Congress under the Fourteenth Amendment. First, in each abrogation decision that it has rendered since *Seminole Tribe*, this Court has carefully examined whether Congress heard evidence and made findings which establish that the States had themselves engaged in a widespread and continuing pattern of constitutional violations. *See, e.g., Kimel*, 528 U.S. at 88-91; *Florida Prepaid*, 527 U.S. at 640-48; *cf. Boerne*, 521 U.S. at 530-31. For example, in its recent decision in *Florida Prepaid*, the Court relied almost entirely on the absence of such evidence in striking down legislation that purported

to abrogate Eleventh Amendment immunity. *See Florida Prepaid*, 527 U.S. at 646-48.[1]

Second, this Court has also considered whether adequate evidence was presented to Congress that pre-existing remedies and forums are incapable of protecting the particular rights at issue. *See, e.g., Florida Prepaid*, 527 U.S. at 644 ("Congress itself said nothing about the existence or adequacy of state remedies in the statute or in the Senate Report, and made only a few fleeting references to state remedies in the House Report."); *cf. South Carolina v. Katzenbach*, 383 U.S. 301, 313-15 (1966). The obvious (and commonsense) implication is that if existing remedies and forums are adequate, abrogation is likely not a "congruent and proportional" measure. *See id.*

Finally, this Court has carefully examined in each instance whether Congress properly tailored its legislation to address the specific circumstances that warranted the legislation in the first place. *See, e.g., Kimel*, 528 U.S. at 89-90; *Florida Prepaid*, 527 U.S. at 647 (noting that Congress did not "make any attempt to confine the reach of the [Patent] Act by . . . providing for suits only against

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[1] This Court has noted that congressional "findings" are not a prerequisite to abrogation. *See, e.g., Florida Prepaid*, 527 U.S. at 646. In each abrogation case since *Seminole Tribe*, however, this Court has nonetheless carefully reviewed the evidence that was presented to Congress and has relied heavily on the lack of findings in rejecting abrogation. *See id.; see also Kimel*, 528 U.S. at 648-50; *cf. Boerne*, 521 U.S. at 530-31. Thus, the Court's practice suggests that while findings may not be an absolute prerequisite, they are an extremely important consideration in determining whether abrogation was appropriate. *See id.*

States with questionable remedies or a high incidence of infringement"). The Court has thus made clear that even if circumstances justify some manner of prophylactic legislation, Congress still does not have a blank check to rewrite the substance of the Constitution. *See, e.g., Boerne*, 521 U.S. at 530; *Florida Prepaid*, 527 U.S. at 638-39; *Kimel*, 528 U.S. at 81. Congress must instead carefully tailor its legislation to remedy the problem that justified abrogation in the first instance. *See Florida Prepaid*, 527 U.S. at 639; *College Savings Bank*, 527 U.S. at 672.

A. The Decision Of The Court Of Appeals Directly Conflicts With The Standards Established By This Court

It is clear that none of the factors discussed above apply in the case of the Equal Pay Act. As a result, it is difficult to conceive how either the expanded definition of "discrimination" that the Equal Pay Act imposes on the States or the remedy of abrogation itself can be considered "congruent and proportional" to the harm that they were intended to address. *See, e.g., College Savings Bank*, 527 U.S. at 675 (asking whether prophylactic legislation was "genuinely necessary to prevent violation of the Fourteenth Amendment"). Thus, the Equal Pay Act cannot be considered "congruent and proportional" or appropriately "remedial" if those words are to retain their common and natural meanings.

1. The Legislative History Of The Equal Pay Act Is Devoid Of Any Evidence Of Unconstitutional State Conduct

There is no evidence in the legislative history of the Equal Pay Act that any of the States had engaged in a widespread pattern of gender discrimination. The court of appeals admitted as much, finding that "the legislative record of the Equal Pay Act itself is devoid of any explicit findings as to the problem of gender discrimination by states."[2] *See* App. at 16a-17a. Indeed, the legislative history for the 1974 amendments that extended the Equal Pay Act to the States contains no reference whatsoever to gender discrimination by the States. *See, e.g.*, H.R. Rep. No. 93-913, at *passim* (1974), *reprinted in* 1974 U.S.C.C.A.N. 2811-62. As the court of appeals recognized in its prior decision, the primary purpose of Congress in enacting the 1974 amendments to the FLSA and the Equal Pay Act was to extend to state employees the overtime and wage and hour provisions of the FLSA. *See, e.g.*, App.

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[2] Indeed, the court of appeals relied primarily on findings made by Congress in its enactment of Title VII. *See* App. at 17a. This is ironic, since it only highlights the fact that there was already a pre-existing federal remedy that fully addresses intentional discrimination against women. *See id.* These findings have nothing to do with abrogation, the adequacy of state courts or the expansion of the constitutional definition of discrimination, the critical issues that would have had to be addressed if Congress had considered whether abrogation under the Equal Pay Act was in fact a congruent and proportional response to a pervasive problem. *See id.* Thus, the reliance by the court of appeals on Title VII's legislative history only further underscores the infirmities in its decision.

at 38a-39a. There is, however, no evidence whatsoever that Congress specifically considered the Equal Pay Act at all when it extended the FLSA's enforcement provisions to the States. *See id.*; *see also* App. at 1a-20a. In short, extension of the Equal Pay Act to the States was a legislative accident. *See* App. at 38a-39a.

2. There Is No Evidence That Existing Federal And State Remedies Or Forums Were Or Are Insufficient

Because there is no evidence that Congress even considered the Equal Pay Act when it extended the FLSA to the States, it goes without saying that there was no evidence presented to Congress that state remedies or forums were hostile to women or otherwise ineffective in remedying constitutional violations. *See, e.g.*, H.R. Rep. No. 88-309, at *passim* (1963), *reprinted in* 1963 U.S.C.C.A.N. 687-92; S. Rep. No. 88-176, at *passim* (1963). There was likewise no evidence presented to Congress that existing federal remedies were insufficient to enforce the Constitution. *See id.*

Indeed, this case is different in an important way from each of the recent Eleventh Amendment cases that have preceded it to this Court. Unlike the ADEA and the Americans With Disabilities Act ("ADA"), the extension of the Equal Pay Act to the States did not create a federal remedy against the States where none existed before. To the contrary, the Equal Pay Act created a second federal remedy against the States for claims of gender-based employment discrimination. Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et*

seq., was extended to the States in 1972. Congress, however, made no effort to justify the supernumerary remedy created by application of the Equal Pay Act to the States nor is there any indication that Congress even considered whether Title VII was failing to prevent intentional discrimination by the States.

Not only did a federal remedy already exist at the time the Equal Pay Act was extended to the States, but adequate state remedies also existed. There is an enormous body of evidence indicating that the State of Illinois does as much or more than the federal government to protect the rights of women.[3] Section 18 of the Illinois Constitution *explicitly* prohibits gender discrimination by the State in all facets of life, and the Illinois Supreme Court has interpreted Section 18 to require courts to review any statute differentiating on the basis of sex with strict scrutiny, a standard that is actually more exacting than the one imposed by the United States Constitution. *See* Ill. CONST. art. I, § 18; *People v. Ellis*, 57 Ill. 2d 127, 132-133, 311 N.E.2d 98, 101 (1974). In addition, Illinois has passed a variety of other statutes that protect the rights of women to equal treatment in the workplace. *See, e.g.*, 820 ILCS 110/1 *et seq.* (the Equal Wage Act).

In sum, it is generally recognized that enforcement of women's rights in the State of Illinois has been extremely successful. *See generally* Mary Lee Leahy, *The Hope for*

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[3] Illinois is by no means alone in this regard. At least forty other States have their own civil rights acts and/or equal pay acts. *See, e.g.*, 775 ILCS 5/1-101 *et seq.*; W. VA. CODE § 5-11-9; LA. REV. STAT. ANN. §§ 301-334; IOWA CODE §§ 216.1-216.20; UTAH CODE ANN. § 34A-5-106.

Equal Protection Under the Law for Women Realized in Illinois, 21 S. ILL. U. L. J. 287, 296 (1997). Thus, it cannot seriously be contended that the State of Illinois or its courts are in any way hostile to women or otherwise incapable of enforcing their rights.

3. The Equal Pay Act Cannot Be Considered "Congruent And Proportional" Legislation

This Court has previously noted that any *"prophylactic measure taken under purported authority of § 5 [must be] genuinely necessary to prevent violation of the Fourteenth Amendment." See, e.g., College Savings Bank*, 527 U.S. at 675 (emphasis added). Under this standard, the Equal Pay Act cannot be considered "congruent and proportional." *See id.* At the time the Equal Pay Act was enacted, a more than effective federal remedy for gender discrimination by the States already existed, namely Title VII. *See* disc. *supra* at 18-19. Adequate state remedies and forums existed as well. *See id.* Finally, there is no evidence of any sort that an expansion of the Constitution's definition of "discrimination" was actually necessary to protect the rights of women. *See* App. at 1a-20a.

The foregoing fully confirms that in the enactment of the Equal Pay Act, there was and is no justification for abrogation of the Eleventh Amendment. *See Kimel*, 528 U.S. at 90; *Florida Prepaid*, 527 U.S. at 644; *Katzenbach*, 383 U.S. at 313-15. Congress may prefer a more expansive definition of discrimination than the one adopted by this Court in *Feeney*. Congress may likewise wish to have that remedy applied in federal courts. As this Court has made clear, however, absent evidence that these "remedies" are

necessary to protect the *constitutional* rights of men and women, Congress may not disregard the scope of the rights established by the Constitution (including the Eleventh Amendment) in the name of "enforcing" them. *See, e.g., Kimel*, 528 U.S. at 80-83; *Boerne*, 521 U.S. at 518-29.

In this case, the court of appeals ignored the need for abrogation entirely when it performed its "congruence and proportionality" analysis. *See* App. at 1a-20a. Therefore, the decision by the court of appeals directly raises the question of whether abrogation can *ever* be proper if there is no evidence that it is necessary to enforce the Constitution. *See id.* This is a question that has received differing treatment from courts around the country, and it is ripe for final resolution by this Court. *Compare Erickson*, 207 F.3d at 951 (noting that extra-constitutional legislation is justified when "*only* by going to these lengths is it possible to implement the core constitutional rule"), *with Hundertmark v. State of Florida Transp.*, 205 F.3d 1272 (11th Cir. 2000) (ignoring altogether the question of whether abrogation is necessary to enforce the Fourteenth Amendment). We respectfully submit that the answer given by the court of appeals here (and by others elsewhere) is wrong and is at odds with the Eleventh Amendment.

III. THE ISSUE PRESENTED HERE IS OF SIGNIFICANT PRACTICAL IMPORTANCE

A. The Decision Below Raises Significant Federalism Concerns

The Constitution creates an explicit presumption that suits against the States by private citizens should not proceed in the federal courts. *See, e.g., Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984). Similarly, this Court has long recognized the difficulties involved in "the prospect of [a State] being thrust, by federal fiat and against its will, into the disfavored status of a debtor, subject to the power of private citizens to levy on its treasury or perhaps even government buildings or property which the State administers on the public's behalf." *See Alden v. Maine*, 527 U.S. 706, 749 (1999).

There can be little doubt that the Equal Pay Act creates just such a prospect. *See, e.g., Kovacevich v. Kent State Univ.*, 224 F.3d 806 (6th Cir. 2000). Claims under the Equal Pay Act are frequently filed against the States by private plaintiffs. *See O'Sullivan v. Minnesota*, 191 F.3d 965 (8th Cir. 1999); *Timmer v. Michigan Dep't of Commerce*, 104 F.3d 833 (6th Cir. 1997). Almost invariably, the plaintiffs in these suits requested sizable money damages, and some cases have in fact resulted in substantial money judgments. *See, e.g., Ramsey v. Alabama PSC*, No. 96-T-275-N, 2000 U.S. Dist. LEXIS 5095, *4 (M.D. Ala. April 13, 2000). Moreover, as the decisions of the various federal courts demonstrate, plaintiffs naturally prefer to assert Equal Pay Act claims over other federal remedies because of the expanded definition of discrimination in the Equal Pay Act. *See, e.g., Fallon*, 882 F.2d at 1213; *Dunn v. United*

Airlines, Inc., No. 96-C-3689, 1998 U.S. Dist. LEXIS 3636, *18 (N.D. Ill. March 11, 1998). Those federal courts of appeals that have addressed this question have permitted abrogation, though none of these courts have suggested that abrogation or the expansion of the definition of discrimination in the Equal Pay Act are in any way necessary to enforce the Constitution. *See Kovacevich*, 224 F.3d at 806; *Hundertmark*, 205 F.3d at 1272; *Anderson v. State Univ. of New York*, 169 F.3d 117 (2d Cir. 1999); *O'Sullivan*, 191 F.3d at 965; *Usery v. Louisiana*, 150 F.3d 431 (5th Cir. 1998), *cert. denied*, 526 U.S. 1013 (1999); *Timmer*, 104 F.3d at 833; *Usery v. Charleston County Sch. Dist.*, 558 F.2d 1169 (4th Cir. 1977); *Usery v. Allegheny County Inst. Dist.*, 544 F.2d 148 (3d Cir. 1976), *cert. denied*, 430 U.S. 946 (1977).[4]

A substantial record also supports the conclusion that many States are blatantly "equalizing" the average salaries of male and female employees who occupy different jobs but do arguably similar work. *See, e.g., Hill v. Ross*, 183 F.3d 586, 586-92 (7th Cir. 1999); *see also Maitland v. Univ. of Minnesota*, 155 F.3d 1013, 1015-18 (8th Cir. 1998); *Smith v. Virginia Commonwealth Univ.*, 84 F.3d 672, 673-84 (4th Cir. 1996). Many of these efforts take the form of bestowing blanket "equity" payments to female employees but not to males. *See id.* These efforts to avoid liability under the Equal Pay Act often create more problems than they solve. *See, e.g., Smith*, 84 F.3d at 673-84 (Wilkinson, J., concurring).

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[4] With the exception of *Kovacevich* and *Hundertmark*, all of these decisions were issued prior to *Kimel* and *Florida Prepaid*.

The Fourteenth Amendment, of course, prohibits discrimination against men as well as women, and making cash payouts to women but not to men is the very paradigm of the type of intentional discrimination prohibited by the Constitution. *See, e.g., Smith*, 84 F.3d at 677 (Wilkinson, J., concurring). Thus, a clear consequence of the opinion by the court of appeals is to place the States squarely on the horns of a serious dilemma – either eliminate all disparities between men and women (whether the result of unconstitutional discrimination or not) with the likely result that men will make a claim under the Fourteenth Amendment for reverse discrimination *or* allow justified differences to persist with the likely result that a State will face suit under the Equal Pay Act. *See, e.g., Maitland*, 155 F.3d at 1015-17. We respectfully submit that placing the States in this sort of dilemma is wholly inconsistent with both the Eleventh Amendment and the Fourteenth Amendment. *See, e.g., Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991); *Alden*, 427 U.S. at 748; *Dellmuth v. Muth*, 491 U.S. 223, 227 (1989).

B. The Decision Below Raises Significant Concerns Regarding The Separation Of Powers

The decision of the court of appeals also has implications that extend well beyond the Eleventh Amendment. Because Congress heard no evidence that the liability provisions of the Equal Pay Act are necessary to adequately safeguard the rights protected by the Constitution, this case squarely addresses the scope of Congress' authority under Section 5. *See College Savings Bank*, 527 U.S. at 675. As discussed above (*see* disc. *supra* at 13-16), this Court has emphasized that the exercise by Congress

of its Fourteenth Amendment power may only be used to "enforce" or "remedy" violations of the Constitution as defined by this Court. *See Boerne*, 521 U.S. at 519. Congress may not rewrite this Court's decisions merely because it would prefer a different standard. *See id.* It is, however, difficult to avoid the conclusion that just such a rewrite was what occurred with respect to the Equal Pay Act. *See Feeney*, 442 U.S. at 273-74; *see also Washington v. Davis*, 426 U.S. 229, 238-39 (1976).

The court of appeals attempted to minimize the differences between these two standards, and its decision rested heavily on the conclusion that the difference between the liability standard of the Equal Pay Act and the standard imposed by the Constitution was justified because the expansion was not significant. *See* App. at 15a. Smaller changes may be more easily justified than larger ones. Unless some justification is required in all cases, however, Congress would always have the power to rewrite the Constitution so as long as its revisions were not wholesale. We again respectfully suggest that this would effectively cede to Congress the power to determine the specific meaning of constitutional provisions in nearly every instance, and this cannot be the law. *See Boerne*, 521 U.S. at 535-36. It is the responsibility and prerogative of this Court to determine the meaning of the Constitution. *See id.*

IV. IF PLENARY REVIEW IS NOT GRANTED AT THIS TIME, THIS PETITION SHOULD BE HELD PENDING THIS COURT'S DECISION IN *BOARD OF TRUSTEES V. GARRETT*, NO. 99-1240

On April 17, 2000, this Court accepted certiorari in a case involving the application of the Eleventh Amendment to the ADA. *See Board of Trustees of Univ. of Alabama v. Garrett*, 120 S. Ct. 1669 (2000). Like the Equal Pay Act, the ADA prohibits constitutionally-permissible state action but nevertheless purports to abrogate Eleventh Amendment immunity. *See, e.g., Erickson*, 207 F.3d at 951. Argument was heard by this Court in *Garrett* on October 11, 2000, and the matter is now submitted for the Court's decision.[5] *See* App. at 166a.

The parallels between the arguments raised here by ISU and those raised in *Garrett* are striking. In *Garrett*, the State of Alabama has argued that abrogation is inappropriate absent evidence of widespread constitutional violations and absent any reason to believe that extra-constitutional legislation is necessary to protect the rights enumerated by the Constitution. *See* App. at 167a-188a. In neither this case nor *Garrett*, however, did Congress find evidence of a pattern of discrimination by the States. *See* App. at 16a-17a; App. at 169a-177a. Likewise, in both cases there is no evidence that the States are hostile to the

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[5] The Court appears to be holding several other petitions for certiorari that raise the Eleventh Amendment question in the context of the ADA. *See, e.g., Stevens v. Illinois DOT*, 210 F.3d 732 (7th Cir. 2000) (petition for certiorari still pending, though filed on June 30, 2000); *Erickson*, 207 F.3d at 945 (petition for certiorari still pending, though filed on June 26, 2000); *Walker v. Missouri Dep't of Corrections*, 213 F.3d 1035 (8th Cir. 2000) (petition for certiorari still pending, though filed on October 10, 2000).

rights at issue. Moreover, there is substantial evidence in both cases that the States have done as much or more to protect the rights at issue as has the federal government. *See* App. at 169a-177a; disc. *supra* at 19-20. Both cases therefore raise the critical question of the right of Congress to enact legislation that essentially alters the constitutional standard established by this Court. *See* App. at 1a-20a; App. at 167a-168a.

In light of the parallels between this case and *Garrett*, it is almost certain that this Court's decision in *Garrett* will have a material bearing on the resolution of this case. Thus, this petition should at a minimum be held pending the outcome in *Garrett*.

CONCLUSION

For the reasons stated herein, ISU's petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: February 6, 2001

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In the
United States Court of Appeals
for the Seventh Circuit

No. 97-3253

DR. IRIS I. VARNER, *et al.*,

Plaintiffs-Appellees,

and

UNITED STATES OF AMERICA,

Intervening Appellee,

v.

ILLINOIS STATE UNIVERSITY, *et al.*,

Defendants-Appellants.

Appeal from the United States District Court
for the Central District of Illinois, Peoria Division.
No. 95 C 1355 – **Michael M. Mihm**, *Judge.*
On Remand from the United States Supreme Court
No. 98-1117

ARGUED MAY 31, 2000 – DECIDED SEPTEMBER 6, 2000

Before FLAUM, *Chief Judge*, and BAUER and HARLINGTON WOOD, JR., *Circuit Judges.*

FLAUM, *Chief Judge.* The plaintiffs comprise a class of tenured and tenure-track female faculty members at Illinois State University (the "University") who contend that the University pays female professors less money than their male counterparts. In 1995, the plaintiffs filed suit seeking both monetary and injunctive relief against the University and various of its officers and agents (collectively the "defendants"), alleging violations of the Equal

Pay Act, 29 U.S.C. § 206(d), and Title VII, 42 U.S.C. § 2000e *et seq*. The University, which the plaintiffs concede is a state entity, moved to dismiss the Equal Pay Act claim, as well as the claim for compensatory relief under Title VII, arguing that the Eleventh Amendment bars federal jurisdiction over these claims. The district court denied the defendants' Eleventh Amendment defense, and the defendants appealed that decision to this Court under the collateral order doctrine, *see Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 145 (1993) (holding that the collateral order doctrine allows for immediate appellate review of the denial of an Eleventh Amendment immunity claim).

In our initial consideration of this case, we affirmed the district court in all respects, finding that Congress clearly intended to abrogate the States' Eleventh Amendment immunity through its passage of the Equal Pay Act, and that this abrogation was a valid exercise of congressional authority under § 5 of the Fourteenth Amendment. *See Varner v. Illinois St. Univ.*, 150 F.3d 706, 717 (7th Cir. 1998), *vacated*, 120 S.Ct. 928 (2000). Although we further determined that Title VII contained an explicit abrogation of the States' Eleventh Amendment immunity, we did not consider whether that abrogation was a valid exercise of congressional authority because we held that the defendants had waived that issue by failing to present it sufficiently to the district court. *See id.* at 717 n.14. The defendants appealed our rejection of their Eleventh Amendment defense to the United States Supreme Court.

On writ of *certiorari* to the Supreme Court, our original opinion affirming the district court was vacated and remanded, *see Illinois St. Univ. v. Varner*, 120 S.Ct. 928

(2000), for further consideration in light of the Court's intervening decision in *Kimel v. Florida Bd. of Regents*, 120 S.Ct. 631 (2000) (holding that the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, was not a valid abrogation of the States' sovereign immunity). After considering the defendants' assertion of Eleventh Amendment immunity against the backdrop of the Supreme Court's decision in *Kimel*, it remains our conclusion that the district court properly rejected the defendants' claim of sovereign immunity and denied their motion to dismiss. Consequently, we affirm the decision of the district court.

I. Analysis

The Eleventh Amendment provides that, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens of Subjects of any Foreign State." U.S. Const. amend. XI. While the Eleventh Amendment appears to restrict only the federal courts' Article III diversity jurisdiction, the Amendment has long been understood "to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms." *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991). Under the Eleventh Amendment, each State in our federal system remains a sovereign entity and may not be sued by an individual without its consent, *see Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996) (citing *Hans v. Louisiana*, 134 U.S. 1, 13 (1890)).

Although the Eleventh Amendment grants unconsenting States immunity from suit in federal court, that immunity is not absolute. *See College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S.Ct. 2219, 2223 (1999); *see also Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) ("[T]he Eleventh Amendment, and the principles of state sovereignty which it embodies, . . . are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment."). Congress may constitutionally abrogate the States' Eleventh Amendment immunity if two criteria are satisfied: (1) Congress must unequivocally express its intent to abrogate the States' sovereign immunity; and (2) in abrogating that immunity, Congress must act pursuant to a valid exercise of power. *See Seminole Tribe*, 517 U.S. at 55. Because the defendants no longer contest Congress' intent to abrogate the States' Eleventh Amendment immunity in this case, we need only consider the question of whether the abrogations of sovereign immunity contained in the statutes at issue are valid exercises of congressional power under § 5 of the Fourteenth Amendment.[1]

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[1] The defendants no longer dispute that Congress unequivocally expressed its intent to abrogate the States' Eleventh Amendment immunity in the Equal Pay Act. Furthermore, the Supreme Court addressed this issue in *Kimel* when it stated that the enforcement provisions set forth in 29 U.S.C. § 216(b), which authorizes private suits to enforce both the ADEA and the Equal Pay Act, "clearly demonstrate Congress' intent to subject the States to suit for money damages at the hands of individual employees." *Kimel*, 120 S.Ct. at 640. We therefore do not address the defendants' original claim that the Equal Pay Act does not contain an unmistakable expression of Congress' intent to abrogate States' Eleventh Amendment rights.

In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court explained that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional." *Id.* at 518; *see also Kimel*, 120 S.Ct. at 644 ("Congress' power 'to enforce' the [Fourteenth] Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text."). At the same time, the *City of Boerne* decision made clear that this affirmative grant of congressional power is limited to "enforcing" the Amendment's restrictions on the States and does not extend to determining what constitutes a constitutional violation. *City of Boerne*, 521 U.S. at 519. Recognizing that Congress must have latitude in determining where the line lies between appropriate remedial legislation and a substantive redefinition of a constitutional right, the Court held that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 520.

Because the requirements of congruence and proportionality mark the boundaries of Congress' Fourteenth Amendment enforcement power, and because Congress lacks the power to abrogate the States' sovereign immunity under Article I of the Constitution,[2] *see Seminole*

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[2] Although the defendants do not renew their argument that the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, which contains the Equal Pay Act, was an invalid attempt

Tribe, 517 U.S. at 72-73, congressional legislation that creates a cause of action against the States must satisfy the

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to abrogate the States' sovereign immunity under the Commerce Clause, we want to reaffirm our original holding rejecting that claim. Although Congress explicitly stated that the FLSA constituted an exercise of congressional power under the Commerce Clause, *see* 29 U.S.C. § 202(b), we do not believe that Congress expressly relied on its Commerce Clause power when it extended the FLSA, and consequently the Equal Pay Act, to the States, *see Timmer v. Michigan Dep't of Commerce*, 104 F.3d 833, 838-39 n.7 (6th Cir. 1997) ("We believe that th[e] legislative history [of the Equal Pay Act] falls far short of constituting an 'express statement' of congressional intent."), or that any reliance on its commerce power was intended to be exclusive, *see Mills v. Maine*, 118 F.3d 37, 44 (1st Cir. 1997) ("[O]ne cannot read Congress' statement regarding the [Equal Pay] Act's validity under the Commerce Clause to indicate that Congress intended to exclude other applicable constitutional bases for the Act.") (quotations and alteration omitted).

Because we remain unconvinced that Congress clearly expressed an intention to proceed under its commerce power when it applied the Equal Pay Act to the States, the key "inquiry is whether the objectives of the legislation are within Congress' power under [§[5] of the Fourteenth Amendment]." *EEOC v. Elrod*, 674 F.2d 601, 608 (7th Cir. 1982). Under this standard, it is not difficult to conclude that the objectives of the Equal Pay Act are within Congress' powers under the Fourteenth Amendment. The purpose of the Equal Pay Act is to prevent arbitrary gender-based wage disparities, while prohibiting "arbitrary, discriminatory government conduct . . . is the very essence of the guarantee of 'equal protection of the laws' of the Fourteenth Amendment." *Id.* at 604. We thus conclude that the Equal Pay Act's prohibition on discrimination fits within the objectives of § 5 of the Fourteenth Amendment, and that the Act is an exercise of congressional power under § 5. This does not mean, however, that Congress' action in subjecting state employers to the Equal Pay Act was a valid exercise of its authority under § 5, a subject which is addressed *infra*.

congruence and proportionality test. In *Kimel*, 120 S.Ct. 631, the Supreme Court used the congruence and proportionality test to determine whether the ADEA validly abrogated the States' sovereign immunity. The ADEA makes it unlawful for an employer, including a State, "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual . . . because of such individual's age," 29 U.S.C. § 623(a)(1). The *Kimel* Court held that, although the ADEA contained a clear statement of Congress' intent to abrogate the States' Eleventh Amendment immunity, that abrogation exceeded Congress' Fourteenth Amendment enforcement power. *Kimel*, 120 S.Ct. at 640-50.

Applying the congruence and proportionality test, the *Kimel* Court relied on a number of factors in concluding that Congress exceeded its authority in creating an individual cause of action for money damages against the States under the ADEA. Because age is not a suspect classification under the Equal Protection Clause, States may discriminate on the basis of age without offending the Fourteenth Amendment if the challenged age classification is rationally related to a legitimate state interest. The Court found that the ADEA, "through its broad restriction on the use of age as a discriminating factor, prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable [constitutional] standard." *Id.* at 647. Furthermore, the Court found little in the ADEA's legislative record to confirm that age discrimination by the States was a widespread problem that demanded a strong remedy. *See id.* at 648-49. "In light of the indiscriminate scope of the Act's substantive requirements, and the lack

of evidence of widespread and unconstitutional age discrimination by the States," the Court held that the ADEA's abrogation of the States' Eleventh Amendment immunity was not a valid exercise of Congress' enforcement power under § 5 of the Fourteenth Amendment. *Id.* at 650.

This Court has recently applied the congruence and proportionality test in the context of individual suits against the States under the Americans With Disabilities Act ("ADA"), 42 U.S.C. § 12111 *et seq.* In *Erickson v. Board of Governors of State Colleges and Universities for Northeastern Ill. Univ.*, 207 F.3d 945 (7th Cir. 2000), we held that Title I of the ADA, 42 U.S.C. §§ 12111-12117, which prohibits discrimination in employment based on disability and requires employers to reasonably accommodate disabled individuals, was an invalid exercise of congressional authority under § 5 of the Fourteenth Amendment. *See also Stevens v. Illinois Dep't of Transp.*, 210 F.3d 732 (7th Cir. 2000). In reaching this conclusion, we determined that "the disparate-impact and mandatory-accommodation rules found in the ADA" far exceeded the constitutional protections provided by the Equal Protection Clause. *Erickson*, 207 F.3d at 951; *see also Stevens*, 210 F.3d at 738. Furthermore, we concluded that these provisions could not be sustained as "reasonable prophylactic legislation." *Erickson*, 207 F.3d at 951-52; *see also Stevens*, 210 F.3d at 740-41. Underlying this holding was our understanding that Congress could not subject disability discrimination, which receives only rational basis review under the Constitution, *see Cleburne v. Cleburne Living Center*, 473 U.S. 432, 442-46 (1985), to more searching scrutiny. *See Erickson*, 207 F.3d at 951 (holding that the

ADA "exceed[s] the § 5 power . . . at least to the extent it extends beyond remedies for irrational discrimination"). In light of these principles drawn from prior precedent, we now review the defendants' challenge to the validity of Congress' abrogation of the States' Eleventh Amendment immunity in the Equal Pay Act *de novo, see EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1279 (7th Cir. 1995) (stating that pure claims of law are reviewed *de novo*).

A. The Equal Pay Act

The Equal Pay Act prohibits discrimination in wages based on gender.[3] In order to prevail on an Equal Pay Act claim, an employee must first demonstrate unequal pay for "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." 29 U.S.C. § 206(d)(1); *see Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974). Once an employee has met her burden of showing unequal pay for equal work, an employer may avoid liability under the Act by proving that the wage disparity exists "pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex." 29 U.S.C. § 206(d)(1); *see Corning Glass*, 417 U.S. at 196. In

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[3] Although the Equal Pay Act constitutes a separate act of Congress, it was originally enacted in 1963 as an amendment to the FLSA. In 1974, the Equal Pay Act was applied to the States by virtue of an amendment extending the protections of the FLSA to state employees.

effect, the provisions of the Equal Pay Act establish a rebuttable presumption of sex discrimination such that once an employee has demonstrated that an employer pays members of one sex more than members of the opposite sex, the burden shifts to the employer to offer a gender-neutral justification for that wage differential. *See id.* at 196; *Fallon v. Illinois*, 882 F.2d 1206, 1211 (7th Cir. 1989).

Because a *prima facie* case under the Equal Pay Act requires only an initial showing of a wage differential between the sexes, the Act's remedial provisions do not perfectly mirror the Constitution's prohibition on gender discrimination. Under the Equal Pay Act, an employer is potentially subject to liability without a showing of discriminatory intent. *See Stopka v. Alliance of Am. Insurers*, 141 F.3d 681, 685 (7th Cir. 1998) ("The E[qual] P[ay] A[ct] does not require proof of discriminatory intent."); *see also Berry v. Board of Supervisors of LSU*, 715 F.2d 971, 975 (5th Cir. 1983) (holding that the mere allegation that a female professor was paid less than a male colleague for equal work stated a claim under the Equal Pay Act). In contrast, in order to make out a claim of gender discrimination under the Constitution, an individual must demonstrate an intent to discriminate on the part of the employer. *See Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 274 (1979) (stating that it is "purposeful [gender] discrimination . . . that offends the Constitution") (internal quotation omitted); *Washington v. Davis*, 426 U.S. 229, 238-39 (1976). Because the Equal Pay Act allows a finding of gender discrimination absent a showing of discriminatory intent, while the Constitution does not, the effect of

the Equal Pay Act's burden-shifting remedial scheme is to prohibit at least some conduct that is constitutional.

The plaintiffs concede that the Equal Pay Act does not preclude the possibility that an employer will be held liable for conduct that is not prohibited by the Constitution. However, as the plaintiffs note, the Supreme Court has made clear that the mere fact that a statute's remedial regime is broader in scope than the constitutional prohibitions against discrimination does not mean that the statute is not a proportional and congruent response to that problem. *See Kimel*, 120 S.Ct. at 644 ("Congress' § 5 power is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment."); *City of Boerne*, 521 U.S. at 518. Section 5 of the Fourteenth Amendment is a remedial provision, and Congress has both the power and the discretion to enforce its guarantees through prohibitions broader than those contained in the Constitution. *See Kimel*, 120 S.Ct. at 644. Furthermore, because "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, . . . Congress must have wide latitude in determining where it lies." *City of Boerne*, 521 U.S. at 519-20; *see also Kimel*, 120 S.Ct. at 644 ("[T]he determination whether purportedly prophylactic legislation constitutes appropriate remedial legislation, or instead effects a substantive redefinition of the Fourteenth Amendment right at issue, is often difficult."); *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966) ("Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure

the guarantees of the Fourteenth Amendment."). The question before us, therefore, is not whether the remedial provisions of the Equal Pay Act prohibit some constitutional conduct. Instead, we must consider whether the Act can be characterized as a proportional and congruent response to the problem of unconstitutional wage discrimination based on gender.

The defendants contend that the burden-shifting effect of the Equal Pay Act renders it an invalid exercise of congressional authority under § 5 of the Fourteenth Amendment because, like the ADEA, it is "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *City of Boerne*, 521 U.S. at 532. However, unlike the ADEA, which "impose[d] substantially higher burdens on state employers" than the Constitution, *Kimel*, 120 S.Ct. at 648, the remedial regime of the Equal Pay Act is less indiscriminate in scope than the ADEA. In passing the Equal Pay Act, Congress did not prohibit all wage practices that result in a disparate impact upon the sexes, nor did it provide for liability upon a mere showing of unequal pay. *See EEOC v. Francis W. Parker Sch.*, 41 F.3d 1073, 1077 (7th Cir. 1994) (stating that the Equal Pay Act "has been construed to preclude disparate impact claims") (citing *County of Wash. v. Gunther*, 452 U.S. 161, 170-71 (1981)); *see also Marshall v. City of Sheboygan*, 577 F.2d 1, 4 (7th Cir. 1978) (stating that Congress' purpose in enacting the Equal Pay Act was not to prohibit all disparities in pay between men and women, but rather to "eliminate 'discrimination on account of sex in the payment of wages.' ") (quoting Preamble, Equal Pay Act, Pub. L. No.

88-38, 77 Stat. 56). Rather, an examination of the purpose of the Equal Pay Act, and an evaluation of its remedial scheme, demonstrate that the Act is targeted at the same kind of discrimination forbidden by the Constitution.

In comparing the provisions of the ADEA disapproved in *Kimel*, and the remedial scheme of the Equal Pay Act, perhaps the most significant difference between the two statutes is in the exemptions from liability provided to employers once a *prima facie* case of discrimination has been made. In *Kimel*, the Supreme Court stated that, despite the narrowly-construed "bona fide occupational qualification" defense from liability under the ADEA, "the Act's substantive requirements nevertheless remain at a level akin to our heightened scrutiny cases under the Equal Protection Clause." *Kimel*, 120 S.Ct. at 648. In contrast, by providing a broad exemption from liability under the Equal Pay Act for any employer who can provide a neutral explanation for a disparity in pay, Congress has effectively targeted employers who intentionally discriminate against women. *See Gunther*, 452 U.S. at 170 (stating that "[t]he fourth affirmative defense of the Equal Pay Act . . . was designed . . . to confine the application of the Act to wage differentials attributable to sex discrimination"); *see also Feeney*, 442 U.S. at 275 (stating that where an action "could not be plausibly explained on a neutral ground, impact itself would signal that the real classification made . . . was in fact not neutral"). In other words, the broad exemption from liability in the Equal Pay Act for wage differentials based on "any other factor other than sex," 29 U.S.C. § 206(d)(iv), indicates that the Act is intended to address the same

kind of "purposeful [gender] discrimination," *Feeney*, 442 U.S. at 274, prohibited by the Constitution.

That the Equal Pay Act is primarily a response to the problem of unconstitutional wage discrimination against women is made clear by a comparison of the Act's remedial provisions with those of several recently invalidated statutes. As we noted in *Erickson*, one of the central problems with the ADEA identified in *Kimel* is that "[m]ost age discrimination is rational, and therefore constitutional, yet the Act forbids it." *Erickson*, 207 F.3d at 948. Having identified this as one of the "principal propositions" of *Kimel*, *id.*, we then went on to reject individual suits against the States under Title I of the ADA, in part because the disparate impact and mandatory accommodation rules in the statute were too far "outside the boundaries of constitutional discourse." *Id.* at 951. Prior to *Kimel*, the Supreme Court used similar reasoning in holding that the Patent and Plant Variety Protection Remedy Clarification Act ("Patent Remedy Act"), Pub. L. No. 102-560, 106 Stat. 4230 (1992), which authorized damage claims against States for patent infringement, was not a valid exercise of congressional authority under § 5. *See Florida Prepaid*, 119 S.Ct. at 2210-11. According to the Supreme Court, because the Due Process Clause only forbids patent infringement by States when it is intentional and when state tort law does not provide a remedy, the application of the Patent Remedy Act to "[a]n unlimited range of state conduct" was beyond the scope of Congress' powers under § 5 of the Fourteenth Amendment. *Id.* at 2210.

In contrast to the statutes at issue in *Kimel*, *Florida Prepaid*, and *Erickson*, the Equal Pay Act is not aimed at a

kind of discrimination (like age or disability) that receives rational basis review. Under the Constitution, gender-based classifications are afforded heightened scrutiny. *See J.E.B. v. Alabama*, 511 U.S. 127, 136 (1994). Once an individual is able to establish the existence of a gender-based distinction, "[p]arties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action." *United States v. Virginia*, 518 U.S. 515, 531 (1996) (citation omitted); *see also Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (holding that a gender classification must serve "important governmental objectives" and that "the discriminatory means employed [must be] substantially related to the achievement of those objectives") (internal quotations omitted). In many ways, the requirement that parties show an "exceedingly persuasive justification" for gender-based classifications is more demanding than the Equal Pay Act's provision allowing a party to avoid liability under the statute if they can demonstrate that the established wage disparity is based on something other than sex. Because the Constitution demands an "exceedingly persuasive justification" for gender discrimination, while the Equal Pay Act only requires an employer to offer some legitimate reason for a wage disparity other than sex, in the great majority of cases the Equal Pay Act does not subject employers to liability in situations where the Constitution does not.

The fact that the Equal Pay Act prohibits little constitutional conduct is significant, but the defendants contend that we must also consider the adequacy of the legislative findings supporting the application of the Act to the States. According to the defendants, the legislative

findings underlying the Equal Pay Act address only the problem of discrimination in private industry, and therefore do not justify the application of the Equal Pay Act to public employees. Although we recognize that a review of the legislative record can be an instructive means of distinguishing appropriate remedial action from an impermissible substantive change in legal rights, *see id.*, we want to emphasize that a "lack of support [in the legislative record] is not determinative of the § 5 inquiry." *Kimel*, 120 S.Ct. at 649; *see also Florida Prepaid*, 119 S.Ct. at 2210; *City of Boerne*, 521 U.S. at 531-32. This observation is particularly relevant in the context of the Equal Pay Act, where the value of congressional findings is greatly diminished by the fact that the Act prohibits very little constitutional conduct, *see City of Boerne*, 521 U.S. at 533 (stating that the kind of limitations reflected in the legislative findings inquiry "tend to ensure Congress' means are proportionate to ends legitimate under § 5" in circumstances where "a congressional enactment *pervasively* prohibits constitutional state action") (emphasis added), and where the historical record clearly demonstrates that gender discrimination is a problem that is national in scope.

In considering the validity of congressional action under § 5 of the Fourteenth Amendment, "[t]he ultimate question [is] not whether Congress created a sufficient legislative record, but rather whether, given all of the information before the Court, it appears that the statute in question can appropriately be characterized as legitimate remedial legislation." *Kilcullen v. New York Dep't of Labor*, 205 F.3d 77, 81 (2d Cir. 2000). While it is true that the legislative record of the Equal Pay Act itself is devoid

of any explicit findings as to the problem of gender discrimination by the States, *see Hundertmark v. State of Fl. Dep't of Transp.*, 205 F.3d 1272, 1276 (11th Cir. 2000), the defendants do not contest the adequacy of the legislative record regarding wage discrimination outside the public sector. Moreover, by the time the Equal Pay Act was extended to the States, Congress had developed a clear understanding of the problem of gender discrimination on the part of States through its passage of legislation such as the Education Amendments of 1972, Pub. L. No. 92-318, tit. IX, 86 Stat. 373 (1972), and its extension of Title VII to state and local employers in the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103 (1972). *See Fullilove v. Klutznick*, 448 U.S. 448, 503 (1980) (Powell, J., concurring) ("After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area."). We believe that this evidence is sufficient to support the limited action taken by Congress in its passage of the Equal Pay Act, particularly given the well-documented history of gender discrimination in this Nation, a history that is embodied in the Supreme Court's own jurisprudence. *See Virginia*, 518 U.S. at 531 (stating that "skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history"); *J.E.B.*, 511 U.S. at 136 (stating that " 'our Nation has had a long and unfortunate history of sex discrimination.' ") (quoting *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973)); *see also Crawford v. Davis*, 109 F.3d 1281, 1283 (8th Cir. 1997) (arguing that it would be difficult "to understand how a statute enacted specifically

to combat [gender] discrimination could fall outside the authority granted to Congress by § 5").

After examining the remedial scheme of the Equal Pay Act and the legislative history surrounding its enactment, we conclude that Congress validly exercised its authority under § 5 of the Fourteenth Amendment when it extended the Equal Pay Act to cover wage discrimination on the part of state employers. Our conclusion in this regard is bolstered both by the Supreme Court's own distinction in *Kimel* between age and gender, *see Kimel*, 120 S.Ct. at 645 ("Age classifications, unlike governmental conduct based on race or gender, cannot be characterized as 'so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy.' ") (quoting *Cleburne*, 473 U.S. at 440), and by our understanding of the purposes of the Equal Pay Act. Congress enacted the Equal Pay Act in an attempt "to remedy . . . the fact that the wage structure of many segments of American industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same." *Corning Glass*, 417 U.S. at 195 (citation and internal quotation omitted). Significantly, it is precisely these kinds of classifications – those based on outdated and inappropriate assumptions about a woman's place in society – at which the protections of the Fourteenth Amendment are also aimed. Because we conclude that the Equal Pay Act is a piece of "remedial or preventive legislation aimed at securing the protections of the Fourteenth Amendment," *Florida Prepaid*, 119 S.Ct. at 2207, we hold that the defendants cannot assert the

Eleventh Amendment as a defense to the plaintiffs' Equal Pay Act claim.[4]

B.

The defendants also contend that the district court erred in determining that Congress validly abrogated the States' Eleventh Amendment immunity under § 5 of the Fourteenth Amendment when it extended the application of Title VII to the States. In our original consideration of this claim on direct appeal, we noted that this Court has already held the extension of Title VII to state employers to be a valid exercise of Congress' § 5 authority. *See Liberles v. County of Cook*, 709 F.2d 1122, 1135 (7th Cir. 1983); *United States v. City of Chicago*, 573 F.2d 416, 423 (7th Cir. 1978) (holding that Congress' extension of Title VII's protections to public employees was "clearly rationally related to and consistent with 'the letter and spirit' of the Fourteenth Amendment"). We then held that the defendants had waived this argument, and consequently any challenge to our existing precedent, by failing to adequately develop it before the district court. *See Varner,*

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[4] In so holding, we join the other Circuits who have considered this issue in the context of the Equal Pay Act. *See Kovacevich v. Kent St. Univ.*, No. 98-3678, 2000 WL 1205859 (6th Cir. 2000); *Hundertmark v. Florida Dep't of Transp.*, 205 F.3d 1272 (11th Cir. 2000); *O'Sullivan v. Minnesota*, 191 F.3d 965 (8th Cir. 1999); *Ussery* [sic] *v. Louisiana*, 150 F.3d 431 (5th Cir. 1998), *cert. dismissed*, 526 U.S. 1013 (1999); *Timmer v. Michigan Dep't of Commerce*, 104 F.3d 833 (6th Cir. 1997); *Usery v. Charleston County Sch. Dist.*, 558 F.2d 1169 (4th Cir. 1977); *Usery v. Allegheny County Inst. Dist.*, 544 F.2d 148 (3d Cir. 1976), *cert. denied*, 430 U.S. 946 (1977).

150 F.3d at 717 n.14 (quoting *United States v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir. 1991)) ("We repeatedly have made clear that perfunctory and undeveloped arguments . . . are waived (even where those arguments raise constitutional issues)."). Because we do not believe that anything in the Supreme Court's remand order necessitates a new analysis of this question, we again hold that the defendants failed to raise their Title VII claim sufficiently before the district court, and have therefore waived that argument for purposes of appeal.

III. Conclusion

Having found that the extension of the Equal Pay Act to the States was a valid exercise of congressional authority under § 5 of the Fourteenth Amendment, and having determined that the defendants waived their § 5 challenge to the plaintiffs' Title VII claims, we AFFIRM the decision of the district court.

A true Copy:

Teste:

Clerk of the United States
Court of Appeals for the
Seventh Circuit

528 U.S. 1110

ILLINOIS STATE UNIVERSITY, ET AL. v.
IRIS I. VARNER, ET AL.

98-1117

SUPREME COURT OF THE UNITED STATES

January 18, 2000, Decided

JUDGES: Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer.

OPINION: The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Seventh Circuit for further consideration in light of *Kimel v. Florida Board of Regents*, 528 U.S. ___ (2000).

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

October 13, 1998

Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*

DR. IRIS I. VARNER, *et al.*, *Plaintiffs-Appellees,*	)	Appeal from the United States District Court for the Central District of Illinois.
No. 97-3253 *v.*	)	
ILLINOIS STATE UNIVERSITY, *et al.*, *Defendants-Appellants.*	)	No. 95 C 1355 Michael J. Mihm Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled case on September 4, 1998, by defendants-appellants, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

No. 97-3253

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

IRIS I. VARNER, *et al.*,
Plaintiffs-Appellees,

and

UNITED STATES OF AMERICA,
Intervenor-Appellee,

v.

ILLINOIS STATE UNIVERSITY, *et al.*,
Defendants-Appellants.

Appeal from the United States District Court
for the Central District of Illinois.
No. 95 C 1355 – **Michael M. Mihm,** *Judge.*

ARGUED FEBRUARY 26, 1998
DECIDED JULY 21, 1998

BEFORE BAUER, HARLINGTON WOOD, JR., and FLAUM, *Circuit Judges.*

FLAUM, Circuit Judge. This appeal concerns the confluence of two recent, significant Supreme Court decisions, *City of Boerne v. Flores,* 117 S. Ct. 2157 (1997), and *Seminole Tribe v. Florida,* 517 U.S. 44 (1996). The plaintiffs represent a class comprised of all tenured or tenure-track female faculty at Illinois State University ("ISU") from the 1982-83 academic year to the present. In 1995, they filed a

complaint against ISU, four of its officials, its Board of Regents, and ten members of the Board (collectively, "the University"). The plaintiffs alleged violations of the Equal Pay Act, 29 U.S.C. § 206(d), and Title VII, 42 U.S.C. § 2000e, and sought injunctive and monetary relief, including compensatory damages for intentional violations of Title VII under 42 U.S.C. § 1981a. The University, which is concededly a state entity, moved to dismiss the Equal Pay Act claim, as well as that part of the Title VII claim seeking compensatory damages. The University argued that its Eleventh Amendment immunity served as a bar to federal jurisdiction with respect to these claims. The district court denied the University's motion to dismiss. *See* 972 F. Supp. 458 (C.D. Ill. 1997), and 986 F. Supp. 1107 (C.D. Ill. 1996).

The University appealed the district court's denial of its Eleventh Amendment immunity defense. We granted the United States' motion to intervene to defend the constitutionality of this application of federal law to the States. We have jurisdiction over this interlocutory appeal pursuant to 28 U.S.C. § 1291 under the collateral order doctrine. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 145 (1993). We affirm the district court's decision in all respects.

I.

The Eleventh Amendment provides, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign

State." U.S. CONST. amend. XI. While the amendment by its terms appears to limit only the federal courts' Article III diversity jurisdiction, the Supreme Court has long "understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms." *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991). The text of the amendment, narrowly written to overrule the Supreme Court's decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), *see Seminole Tribe*, 517 U.S. at 67-70, stands for the larger proposition, inherent in our federal system, that each state remains a sovereign entity. *See id.* at 54 ("For over a century we have reaffirmed that federal jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States.' ") (quoting *Hans v. Louisiana*, 134 U.S. 1, 15 (1890)). Accordingly, the States enjoy an immunity from suit in federal court by all private parties for all causes of action, including suits arising under federal statutes. *See, e.g., Doe v. University of Ill.*, 138 F.3d 653, 656-57 (7th Cir. 1998). State sovereign immunity, however, is not absolute: A state may consent to suit in federal court[1] and, under certain circumstances, Congress may abrogate a state's Eleventh Amendment immunity.

Congress may constitutionally abrogate the States' Eleventh Amendment immunity under a particular statute if it both unequivocally expresses its intent to do so and acts pursuant to a valid exercise of power. *See Seminole Tribe*, 517 U.S. at 55. With respect to the latter inquiry,

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[1] No party contends that Illinois has consented to suit in the instant case.

Seminole Tribe rejected the notion that the Indian Commerce Clause, U.S CONST. art. 1, § 8, cl. 3, confers upon Congress the power to abrogate the States' Eleventh Amendment immunity. *See id.* at 71-73 ("The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."). In so holding, the Court also explicitly overruled *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), in which a plurality of the Court held that the Interstate Commerce Clause, U. S. CONST. art. I, § 8, cl. 3, gave Congress the power to abrogate state sovereign immunity. *See* 517 U.S. at 63-66.

The Court in *Seminole Tribe* reaffirmed, however, that valid legislation pursuant to § 5 of the Fourteenth Amendment could serve as a basis for abrogating state sovereign immunity.[2] *See id.* at 59-60, 63-66 (discussing *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)) ("*Fitzpatrick* was based upon a rationale wholly inapplicable to the Interstate Commerce Clause, viz., that the Fourteenth Amendment, adopted well after the adoption of the Eleventh Amendment and the ratification of the Constitution, operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment."). Thus, "[e]ven after *Seminole Tribe*, 'the Eleventh Amendment does not insulate the states

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[2] Section 5 of the Fourteenth Amendment provides, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." This section enables Congress "to enforce" the Fourteenth Amendment's guarantees that no State shall "deprive any person of life, liberty, or property, without due process of law" or deny any person "the equal protection of the laws.". U.S. CONST. amend. XIV, § 1.

from suits in federal courts to enforce federal statutes enacted under the authority of the Fourteenth Amendment.' " *Goshtasby v. Board of Trustees of the Univ. of Ill.*, 141 F.3d 761, 766 (7th Cir. 1998) (quoting *Crawford v. Indiana Dep't of Corrections*, 115 F.3d 481, 487 (7th Cir. 1997)).

The University raises a number of arguments contending that Congress did not validly abrogate the States' Eleventh Amendment immunity when it passed the Equal Pay Act. First, the University asserts that the Equal Pay Act does not contain a clear and unequivocal expression of Congress's intent to abrogate the States' immunity. Second, the University posits that Congress passed the Equal Pay Act pursuant to its power under the Commerce Clause and not pursuant to its power under § 5. The University argues that, following *Seminole Tribe*, Commerce Clause legislation cannot validly abrogate the States' immunity from suit in federal court. Third, the University asserts that the Equal Pay Act does not constitute valid legislation under Congress's § 5 power in any event. In this context, the University relies on the Supreme Court's interpretation of § 5 in *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997), in conjunction with the fact that the Equal Pay Act does not require proof of intentional discrimination to support a valid claim for relief. The University's Title VII argument is more narrow. It concedes that Title VII itself contains a clear statement of legislative intent to abrogate the States' immunity. *See Fitzpatrick*, 427 U.S. at 456. However, the University argues that 42 U.S.C. § 1981a, which made available a compensatory damages remedy to Title VII plaintiffs, is a distinct statute from Title VII that does not contain its

own statement of congressional intent to abrogate the States' Eleventh Amendment immunity. We address these arguments in turn.

II. The Equal Pay Act

A. Intent to Abrogate

In deciding whether Congress unequivocally expressed its intent to abrogate the States' Eleventh Amendment immunity under the Equal Pay Act, it is helpful to consider the context and history of the statute. Congress passed the Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified at 29 U.S.C. § 206(d)), as an amendment to the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 201 to § 219. The Equal Pay Act, which prohibits wage disparities on the basis of sex,[3] therefore employs the same definitional and enforcement

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[3] The Equal Pay Act provides in relevant part:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex. . . .

29 U.S.C. § 206(d)(1).

provisions as do the overtime and minimum wage provisions of the FLSA. *See* 29 U.S.C. §§ 203, 206-07, 216; *see also Timmer v. Michigan Dep't of Commerce*, 104 F.3d 833, 838 n.6 (6th Cir. 1997). In 1966, Congress amended the FLSA's definition of "employer" to include state government workers employed in hospitals, institutions, or schools. *See* Pub. L. No. 89-601 § 102(b), 80 Stat. 831 (amending 29 U.S.C. § 203(d)). The Supreme Court subsequently held, however, that the 1966 amendment to the FLSA did not abrogate the States' immunity from suit in federal court. *See Employees v. Department of Pub. Health & Welfare*, 411 U.S. 279, 284-86 (1973). As we have noted, *see Mueller v. Thompson*, 133 F.3d 1063, 1065 (7th Cir. 1998), Congress responded to *Employees* by amending certain provisions of the FLSA in the Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55, including its definitions of "employer," 29 U.S.C. § 203 (d) & (x), and "employee," *id.* § 203 (e) (2) (c), as well as its enforcement provision, *id.* § 216(b).[4]

Following the 1974 amendments to the FLSA, the term "employer" is defined to "include[ ] a public

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[4] While our recitation of the history of the Equal Pay Act is helpful in understanding the context of the statutory provisions at issue, this history in itself has no bearing upon our inquiry into whether Congress unequivocally expressed its intent to abrogate the States' Eleventh Amendment immunity. Rather, that intent must be made "unmistakably clear in the language of the statute." *Dellmuth v. Muth*, 491 U.S. 223, 227-28 (1989); *see also, e.g., Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 204 (1991) ("Congressional intent to abrogate Eleventh Amendment immunity must be expressed in the text of the statute; the Court will not look to legislative history in making its inquiry.").

agency." 29 U.S.C. § 203(d). The statute in turn defines "public agency" to include "the government of a State or political subdivision thereof; any agency of . . . a State, or a political subdivision of a State." *Id.* § 203(x). The FLSA defines "employee" to include "any individual employed by a State, political subdivision of a State, or an interstate governmental agency." *Id.* § 203(e) (2) (C). Finally, the Act's private enforcement provision provides in pertinent part, "An action to recover the liability prescribed in either of the preceding sentences [including violations of § 206] may be maintained against any employer (*including a public agency*) *in any Federal or State court* of competent jurisdiction by any one or more employees." *Id.* § 216(b) (emphasis added).

In light of the plain statutory language, which authorizes "employees" to sue "public agencies" in federal court for violations of the Equal Pay Act, we have little difficulty holding that Congress clearly expressed its intent to abrogate the States' Eleventh Amendment immunity when it amended § 216(b) in 1974. We have previously hinted at this holding in both *Mueller*, 133 F.3d at 1065, and *Ende v. Board of Regents*, 757 F.2d 176, 177 n.3 (7th Cir. 1985), and we make it explicit today. In so doing, we join the other circuits that have examined this issue in the context of both the Equal Pay Act and the FLSA. *See Close v. New York*, 125 F.3d 31, 36 (2d Cir. 1997) (FLSA); *Mills v. Maine*, 118 F.3d 37, 41-42 (1st Cir. 1997) (FLSA); *Aaron v. Kansas*, 115 F.3d 813, 814-15 (10th Cir. 1997) (FLSA); *Timmer*, 104 F.3d at 837-38 (Equal Pay Act); *Hale v. Arizona*, 993 F.2d 1387, 1391-92 (9th Cir.) (en banc) (FLSA), *cert. denied*, 510 U.S. 946 (1993).

While the University concedes that the Equal Pay Act creates a private cause of action for state employees, it argues that the statute does no more than permit those employees to sue the States in their own courts. *Compare, e.g., Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468 (1987) (holding that the Jones Act does not abrogate the States' Eleventh Amendment immunity), *with Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197 (1991) (holding that the Federal Employers' Liability Act, which provides the statutory remedial scheme for the Jones Act, creates a cause of action against state employers in their own courts). In this context, the University emphasizes that the statutory provisions discussed above do not contain any explicit references to the "Eleventh Amendment," or to "abrogation of state sovereign immunity." *See, e.g., Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246 (1985) ("A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment."). We previously have concluded, however, that such "magic words" are unnecessary, because "that degree of explicitness is not required." *Davidson v. Board of Governors*, 920 F.2d 441, 443 (7th Cir. 1990); *cf. Seminole Tribe*, 517 U.S. at 56-57 (holding that, even though the statute at issue did not refer explicitly to the Eleventh Amendment, "the numerous references to the 'State' in the text of [the statute] make it indubitable that Congress intended through the Act to abrogate the States' sovereign immunity from suit"). Rather, as we stressed in *Davidson*, all that is necessary is that Congress make "its desire to override the states' sovereign immunity clear[ ]" from the language of the statute. 920 F.2d at 443.

We recently addressed a similar assertion of Eleventh Amendment immunity by the State of Illinois under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-34, in *Goshtasby v. Board of Trustees of the University of Illinois*, 141 F.3d 761, 765-66 (7th Cir. 1998). *Goshtasby* explicitly reaffirmed *Davidson's* rationale on this point. *See id.* Moreover, *Goshtasby* rejected the notion that *Seminole Tribe* altered in any way the traditional inquiry to determine whether Congress unequivocally expressed its intent to abrogate. We concluded that "*Seminole Tribe* simply recycled [the] well-established verbiage in stating that Congress must be 'unmistakably clear.' The analysis was the same one federal courts have used for years." *Id.* at 766 (citations omitted). Thus, we conclude that Congress expressed its intent to abrogate the States' Eleventh Amendment immunity when it amended the Equal Pay Act in 1974.

B. Power to Abrogate

But for the Supreme Court's holding in *Seminole Tribe*, our Eleventh Amendment inquiry into the Equal Pay Act would be complete, as the Equal Pay Act (along with the rest of the FLSA) clearly is within Congress's Commerce Clause powers. *See, e.g., Garcia v. San Antonio Metro. Trans. Auth.*, 469 U.S. 528 (1985); *Marshall v. City of Sheboygan*, 577 F.2d 1, 6 (7th Cir. 1978). However, as we have discussed, *see supra* at 3-4, *Seminole Tribe* established that Congress may only abrogate the States' Eleventh Amendment immunity through legislation validly enacted

pursuant to its § 5 enforcement powers.[5] Because we must determine whether "the Act in question [was] passed pursuant to a constitutional provision granting Congress the power to abrogate," *Seminole Tribe*, 517 U.S. at 59, we therefore are required to consider two questions: (1) whether Congress, in applying the Equal Pay Act to the States, did so pursuant to its § 5 powers and, if so, (2) whether the Equal Pay Act is within Congress's § 5

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[5] Accordingly, all of the circuits to have addressed the issue following *Seminole Tribe* have held that the minimum wage and overtime provisions of the FLSA do not validly abrogate the States' Eleventh Amendment immunity. Those circuits have rejected, either explicitly or implicitly, the argument that the wage and overtime provisions serve a valid Fourteenth Amendment purpose. *See Powell v. Florida*, 132 F.3d 677, 678 (11th Cir.), *cert. denied*, 66 U.S.L.W. 3780 (U.S. June 8, 1998) (No. 97-1667); *Quillin v. Oregon*, 127 F.3d 1136, 1137 (9th Cir. 1997); *Close v. New York*, 125 F.3d 31, 38 (2d Cir. 1997); *Mills v. Maine*, 118 F.3d 37, 48-49 (1st Cir. 1997); *Aaron v. Kansas*, 115 F.3d 813, 816-18 (10th Cir. 1997); *Raper v. Iowa*, 115 F.3d 623, 624 (8th Cir. 1997); *Wilson-Jones v. Caviness*, 99 F.3d 203, 208-11 (6th Cir. 1996). In a case remanded to this Court by the Supreme Court for reconsideration in light of *Seminole Tribe*, we implicitly reached the same holding. *See Mueller v. Thompson*, 133 F.3d 1063, 1064 (7th Cir. 1997) (stating that, in light of *Seminole Tribe*, "[t]he only issue is whether Wisconsin has waived its Eleventh Amendment immunity from suit in federal court under the FLSA" and citing *Mills*, *Raper*, and *Wilson-Jones*). Three of these courts, though, expressly reserved the question of whether the Equal Pay Act validly serves a Fourteenth Amendment purpose. *See Mills*, 118 F.3d at 48; *Aaron*, 115 F.3d at 817; *Raper*, 115 F.3d at 624. Moreover, the Sixth Circuit, in holding that the Equal Pay Act validly abrogates the States' Eleventh Amendment immunity, noted that its holding was not in tension with its contrary holding in *Wilson-Jones*. *See Timmer v. Michigan Dep't of Commerce*, 104 F.3d 833, 842 (6th Cir. 1997).

powers, as interpreted by the Supreme Court in *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997).

1. Whether Congress Exercised its § 5 Powers in Making the Equal Pay Act Applicable to the States

In *EEOC v. Elrod*, 674 F.2d 601, 604-09 (7th Cir. 1982), we considered whether Congress had employed its § 5 enforcement powers when it amended the ADEA in 1974 to cover state employees.[6] Although we recognized that the 1974 amendments to the ADEA did not explicitly refer to Congress's § 5 powers, *id.* at 607-08, we did not believe that this fact was dispositive of our inquiry. Instead, we concluded that "the test of whether legislation is enacted pursuant to § 5 of the Fourteenth Amendment requires no talismanic intoning of the amendment. Rather, the inquiry is whether the *objectives* of the legislation are within Congress' power under the amendment." *Id.* at 608 (citation omitted). Because we concluded that the objectives of the 1974 amendments to the ADEA were "clearly tied to the guarantee of the Equal Protection clause of the Fourteenth Amendment," we held that Congress acted pursuant to its § 5 enforcement powers when it extended the ADEA's coverage to state and local government employees. *See id.* at 608-09.

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[6] These amendments to the ADEA, Pub. L. No. 93-259, 88 Stat. 74, were in fact included in the Fair Labor Standards Amendments of 1974 – the same legislation that amended the FLSA. *See Elrod*, 604 F.2d at 605.

We recently have had two opportunities to consider *Elrod's* rule, in *Doe v. University of Illinois*, 138 F.3d 653, 657-60 (7th Cir. 1998), and in *Goshtasby v. Board of Trustees of the University of Illinois*, 141 F.3d 761, 766-68 (7th Cir. 1998). In *Doe*, which considered the State of Illinois's Eleventh Amendment challenge to Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, we explicitly reaffirmed *Elrod's* analysis, stating that "[t]he appropriate question is, were 'the objectives of [Title IX] . . . within Congress' power' " under the Fourteenth Amendment. 138 F.3d at 660 (alterations in original) (quoting *Elrod*, 674 F.2d at 608). Similarly, *Goshtasby*, which like *Elrod* addressed the ADEA, reaffirmed our holding in *Elrod*, concluding that "the rule remains that Congress need not use magic words to exercise its enforcement power under § 5 of the Fourteenth Amendment." 141 F.3d at 768. *See also Doe*, 138 F.3d at 678 (Easterbrook, J., respecting denial of rehearing en banc) ("Sex discrimination by public schools is a subject within the legislative power under § 5 of the fourteenth amendment, and Congress need not catalog the grants of power under which it legislates; courts do not remand statutes for better statements of reasons.").

Both *Goshtasby* and *Doe* also rejected the argument, which the University raises in the instant case, that *Elrod's* rule contravenes the Supreme Court's cautionary language that "we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment." *Gregory v. Ashcroft*, 501 U.S. 452, 469 (1991) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 16 (1981)). We recognized in *Doe* that the inquiries involved in both *Gregory* and *Pennhurst*

were not similar to our inquiry into whether Congress acted pursuant to § 5 in enacting legislation, the substantive reach of which was clear. Rather, we concluded, those cases concerned the substantive reach of statutory provisions and whether Congress intended to subject the States to mandatory obligations by enacting legislation pursuant to its § 5 powers. *See Doe*, 138 F.3d at 658 & n.6; *see also Goshtasby*, 141 F.3d at 767-68. "In the present inquiry, by contrast, the intended result (of subjecting States to suit for violations of [the Equal Pay Act's] substantive provisions) is clear, and the grant of power under which Congress acted is at issue." *Doe*, 138 F.3d at 658. We therefore continue to adhere to the method of analysis set forth in *Elrod*, which is consistent with the long-recognized rule that "the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948); *see also EEOC v. Wyoming*, 460 U.S. 226, 243 n.18 (1983) (recognizing that "Congress need [not] anywhere recite the words 'section 5' or 'Fourteenth Amendment' or 'Equal Protection' " in order to exercise its § 5 powers).

The Equal Pay Act, however, presents an additional wrinkle that prevents us from proceeding immediately to consider whether the objectives of the Act are within Congress's § 5 powers. The FLSA as originally enacted explicitly stated that the statute constitutes an exercise of Congress's Commerce Clause powers. *See* 29 U.S.C. § 202(b); *see also United States v. Darby*, 312 U.S. 100 (1941) (upholding the constitutionality of the FLSA as a valid

exercise of Congress's Commerce Clause powers). Moreover, when Congress amended the FLSA in 1963 by passing the Equal Pay Act, it explicitly stated that it was relying on its authority to regulate interstate commerce. *See* Pub. L. No. 88-38, § 2(b), 77 Stat. 56, 56. This history would be unexceptional by itself, as it is consistent with Congress's pattern of enacting civil rights statutes under the Commerce Clause to regulate private conduct, as mandated by the holding of the Civil *Rights Cases*, 109 U.S. 3 (1883), and later amending those statutes pursuant to its § 5 authority to encompass government conduct as well. *See, e.g., Elrod*, 674 F.2d at 606-08 (discussing this pattern with respect to Title VII and the ADEA).

The University contends, however, that Congress made a similarly express statement that it was exercising its powers under the Commerce Clause when it extended the FLSA to the States through the Fair Labor Standards Amendments of 1974. According to the University's argument, the Equal Pay Act is unlike the ADEA, in which Congress left the source of its power unstated when it extended the statute's coverage to the States. *See Goshtasby*, 141 F.3d at 767. Therefore, the University argues, the inquiry mandated by *Elrod* – whether the objectives of the statute are within Congress's § 5 powers – is simply inapplicable to this case. Rather, the University believes that we should take Congress at its word and definitively conclude that the 1974 amendments to the Equal Pay Act were enacted solely pursuant to its Commerce Clause powers.

As an initial matter, we note that another court of appeals has rejected the premise that Congress explicitly relied upon its Commerce Clause powers when it

extended the Equal Pay Act's protections to the States. The Sixth Circuit, in addressing the identical question that is before us today, extensively analyzed the legislative history of the Fair Labor Standards Amendments of 1974[7] and reaffirmed its prior holding that "Congress did not expressly state the constitutional basis of its extension of the FLSA to the States in 1974." *Timmer v. Michigan Dept of Commerce*, 104 F.3d 833, 838 (6th Cir. 1997). The court in *Timmer* noted that the report of the Senate Committee on Labor and Public Welfare, S. REP. No. 93-690, 93d Cong., 2d Sess. 24 (1974), merely indicated the Committee's belief that "it had the power to extend the FLSA to the States under the Commerce Clause."[8] *Timmer*, 104 F.3d at 838-39 n.7.

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[7] As our analysis in *Elrod* made clear, we must focus upon the particular legislation that extended a statute's coverage to the States, as opposed to the original statute itself, when determining the source of Congress's power. *See Elrod*, 674 F.2d at 604-08 (considering the 1974 amendments to the ADEA, as opposed to the original legislation enacted in 1967). *Accord, e.g., Mills v. Maine*, 118 F.3d 37, 43 (1st Cir. 1997) (considering the 1974 amendments to the FLSA as opposed to the original legislation); *Timmer v. Michigan Dept of Commerce*, 104 F.3d 833, 838 n.7 (6th Cir. 1997) ("[T]he court properly focused on the 1974 amendments as opposed to the 1963 version of the Equal Pay Act. Although the 1974 legislation was an amendment to an already existing act, it was nevertheless a separate act of Congress.").

[8] The report states, in part:

> The Committee believes that there is no doubt that the activities of public sector employers affect interstate commerce and therefore that the Congress may regulate them pursuant to its power to regulate

The Equal Pay Act, which Congress designated as severable from the other protections of the FLSA, *see* 29 U.S.C. § 219, is mentioned only once in the Senate Committee's 116-page report, in a discussion of the FLSA's historical background. *See* S. REP. No. 93-690, *supra*, at 6. Indeed, the relevant legislative history indicates that Congress concentrated primarily upon extending the FLSA's minimum wage and overtime provisions when it passed the Fair Labor Standards Amendments of 1974. *See id.*; *see also Timmer*, 104 F.3d at 846 n.2 (Boggs, J., dissenting) ("The items debated were primarily the minimum wage and overtime provisions."); *cf. Elrod*, 674 F.2d at 605 (noting that "[l]ittle legislative history exists on the ADEA amendment, . . . because the breadth and significance of the amendments to the FLSA overshadowed the ADEA amendment"). Thus, we do not accept the University's contention, which is solely based upon a murky legislative history, that Congress expressly relied upon its Commerce Clause powers in extending the Equal Pay Act to the States. *Accord Mills*, 118 F.3d at 44 ("[O]ne cannot read Congress' statement regarding the Act's validity under the Commerce Clause to indicate that Congress intended to exclude other applicable constitutional bases for the Act.") (quotations and alteration omitted); *Timmer*,

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> interstate commerce. Without question, the activities of government at all levels affect commerce.

S. REP. No. 93-690, 93d Cong., 2d Sess. 24 (1974). *See also* H.R. REP. No. 93-913, 93d Cong., 2d Sess. 2 (1974) ("It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to. . . . ").

104 F.3d at 838-39 n.7 ("We believe that this legislative history falls far short of an 'express statement' of congressional intent.").

Because we are unconvinced that Congress expressly declared its intention to proceed solely pursuant to its Commerce Clause powers, we conclude that *Elrod's* analysis controls the present inquiry. Pursuant to this analysis, we have little difficulty in concluding that the objectives of the Equal Pay Act were within Congress's powers under the Fourteenth Amendment.[9] As we have discussed, *see supra* at 5-6 & n.3, the purpose of the Equal Pay Act is to prohibit arbitrary sex-based wage disparities. Prohibiting "arbitrary, discriminatory government conduct . . . is the very essence of the guarantee of 'equal protection of the laws' of the Fourteenth Amendment." *Elrod*, 674 F.2d at 604. Thus, we conclude that the Equal Pay Act constitutes an exercise of Congress's § 5 enforcement powers.[10]

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[9] We note that this conclusion is not dispositive of the issue of whether the extension of the Equal Pay Act to the States is constitutionally-valid legislation, which we consider *infra* at 16-22.

[10] Two other courts of appeals, in addition to the Sixth Circuit in *Timmer*, have arrived at the same conclusion. *See Usery v. Charleston County Sch. Dist.*, 558 F.2d 1169, 1171 (4th Cir. 1977); *Usery v. Allegheny County Inst. Dist.*, 544 F.2d 148, 155 (3d Cir. 1976), *cert. denied*, 430 U.S. 946 (1977). Those courts both rejected Tenth Amendment challenges to the Equal Pay Act under the then-prevailing rule of *National League of Cities v. Usery*, 426 U.S. 833 (1976), by holding that the Equal Pay Act was enacted pursuant to Congress's § 5 powers. We applied a different rationale to reject a Tenth Amendment challenge to the Equal Pay Act in *Marshall v. City of Sheboygan*, 577 F.2d 1 (7th Cir. 1978),

2. Whether The Equal Pay Act is Within Congress's § 5 Enforcement Powers

The University argues that Congress exceeded its power to enforce the Fourteenth Amendment when it extended the protections of the Equal Pay Act to the States. In this context, the University relies on the fact that the Equal Pay Act does not require proof of an employer's discriminatory purpose. *See Fallon v. Illinois*, 882 F.2d 1206, 1213 (7th Cir. 1989) (recognizing that "the Equal Pay Act creates a type of strict liability in that no intent to discriminate need be shown") (quotation omitted); *see also Pollis v. New Sch. for Soc. Research*, 132 F.3d 115, 118 (2d Cir. 1997). Because claims of discrimination under the Fourteenth Amendment require proof of purposeful discrimination, *see, e.g., Personnel Adm'r v. Feeney*, 442 U.S. 256, 274 (1979), the University contends that the Equal Pay Act is not within Congress's power "to enforce, by appropriate legislation, the provisions" of the Fourteenth Amendment. U.S. CONST. amend. XIV, § 5. We previously have addressed similar challenges to Title VII's imposition of disparate impact liability. *See Liberales v. County of Cook*, 709 F.2d 1122, 1135 (7th Cir. 1983); *United States v. City of Chicago*, 573 F.2d 416, 422-24 (7th Cir. 1978). We rejected those challenges, holding that the prohibition of policies that had a discriminatory impact was "plainly adapted" to the end of "enforc[ing] the anti-discrimination provisions of the Equal Protection Clause." *Id.* at 423. The University argues, however, that

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but we expressly reserved the question of whether the statute was also a proper exercise of Congress's § 5 powers. *See id.* at 6 n.19.

the Supreme Court's holding in *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997), altered our prior understanding of Congress's Fourteenth Amendment enforcement powers and warrants a different result in the instant case.

In *City of Boerne*, the Supreme Court addressed the constitutionality of the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb-2000bb-4. RFRA was a legislative response to the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), in which the Court had held that the First Amendment's Free Exercise Clause did not require the States to provide exceptions from neutral, generally applicable laws that significantly burden religious practices. *See id.* at 887. Congress enacted RFRA, through its § 5 power to enforce the Due Process Clause, to overcome *Smith's* holding. Accordingly, RFRA provided that laws that substantially burdened the exercise of religion must be justified as the least restrictive means of furthering a compelling state interest. *See* 42 U.S.C. § 2000bb-1.

The Court in *City of Boerne* considered whether legislative resurrection of the "compelling interest" test – "the most demanding test known to constitutional law," 117 S. Ct. at 2171 – constituted a permissible exercise of Congress's § 5 power. The Court examined the legislative record and found that Congress did not enact this test in response to a history of unconstitutional conduct: "RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry." *Id.* at 2169. The Court concluded that RFRA was "so out of proportion" to the burdens on religion that Congress identified and attempted to prevent that the statute could not be understood as an effort

to respond to, or prevent, unconstitutional behavior. *See id.* at 2170. Rather, the Court determined that RFRA "attempt[s] a substantive change in constitutional protections," *id.*, such that the statute went beyond attempting to "enforce" an established constitutional right. Because "Congress's power under § 5 . . . extends only to 'enforc[ing]' the provisions of the Fourteenth Amendment," *id.* at 2164 (alteration in original), the Court struck down RFRA as unconstitutional. *See id.* at 2172.

This analysis clarified what had been an unsettled question in regard to Congress's authority to enforce the Fourteenth Amendment. The Court rejected the substantive, or "ratchet" theory, expressed most forcefully in *Katzenbach v. Morgan*, 384 U.S. 641, 653-56 (1966), which maintained that Congress could expand the substantive rights contained in § 1 of the Fourteenth Amendment even when the courts had explicitly refused to recognize the existence of such rights.[11] In rejecting this theory, the Court explained, "Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine

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[11] The Court in *City of Boerne* asserted that "[a]ny suggestion that Congress has a substantive, non-remedial power under the Fourteenth Amendment is not supported by our case law." 117 S. Ct. at 2167. It did recognize that *Morgan* "could be interpreted as acknowledging a power in Congress to enact legislation that expands the rights contained in § 1 of the Fourteenth Amendment." *Id.* at 2168. However, the Court believed that this was "not a necessary interpretation, . . . or even the best one." Rather, the Court asserted that the legislation at issue in *Morgan* could be justified as a reasonable attempt by Congress to combat unconstitutional discrimination. *See id.*

what constitutes a constitutional violation." *City of Boerne*, 117 S. Ct. at 2164.

Accordingly, in order to determine whether legislation is appropriate under Congress's enforcement power, we must consider whether it deters or remedies unconstitutional conduct. *See id.* at 2163. However, legislation that satisfies this consideration may be appropriate "even if in the process it prohibits conduct which is not itself unconstitutional." *See id.* For an act to be appropriate remedial legislation, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect." *Id.* at 2164.

The University posits that the Equal Pay Act, by not requiring proof of discriminatory intent, necessarily proscribes some state action that is constitutional. Because of this feature, the University argues that the Equal Pay Act constitutes "substantive" legislation. This contention is not without some appeal.[12] The Supreme Court's recognition that Congress's "remedial" power "extends only to

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[12] The Supreme Court's distinction between substantive and remedial legislation has not been applied uniformly in the courts of appeals. In the context of Eleventh Amendment challenges to antidiscrimination statutes, the distinction has resulted in disarray. *Compare Kimel v. Florida Bd. of Regents*, 139 F.3d 1426, 1433, 1448 (11th Cir. 1998) (holding, in a splintered opinion, that the ADEA does not validly abrogate the States' Eleventh Amendment immunity), *with Goshtasby v. Board of Trustees of the Univ. of Illinois*, 141 F.3d 761, 772 (7th Cir. 1998) (holding that the ADEA is a proper exercise of Congress's enforcement power); *compare also Autio v. AFSCME, Local 3139*, 140 F.3d 802, 805 (8th Cir. 1998) ("In passing the [Americans

enforc[ing] the provisions of the Fourteenth Amendment" is difficult to reconcile with the Court's statement that remedial legislation may be appropriate "even if in the process it prohibits conduct which is not itself unconstitutional." *City of Boerne*, 117 S. Ct. at 2163-64. The Supreme Court recognized this difficulty, stating that "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern." *Id.* at 2164. Nonetheless, "the distinction exists and must be observed." *Id.* Therefore, we reject the University's contention that the Equal Pay Act automatically constitutes inappropriate legislation merely because it proscribes some constitutional conduct.

Instead, we consider whether the Equal Pay Act satisfies *City of Boerne's* "proportionality and congruence" test. *See id.* In this context, it is significant that Congress inquired into the extent of sex-based wage discrimination in the workplace prior to enacting the Equal Pay Act.[13]

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with Disabilities Act (ADA)], Congress was not attempting to make a substantive constitutional change."), *with Coolbaugh v. Louisiana*, 136 F.3d 430, 440 (5th Cir. 1998) (Smith, J., dissenting) ("Both RFRA and the ADA purport to establish greater rights for individuals against the states by increasing the measure of judicial scrutiny for conflicting state actions to a level higher than the Supreme Court has found appropriate under the Fourteenth Amendment."), *petition for cert. filed*, 66 U.S.L.W. 3783 (U.S. May 28, 1998) (No. 97-1941).

[13] Legislative findings in this context may be helpful to our inquiry. As the Supreme Court has recognized, however, they are not required. *See City of Boerne*, 117 S. Ct. at 2169-70 ("Judicial deference, in most cases, is based not on the state of the legislative record Congress compiles but 'on due regard for the

See, e.g., S. REP. No. 176, 88th Cong., 1st Sess., 1 (1963). The Supreme Court has recognized that

> Congress' purpose in enacting the Equal Pay Act was to remedy what was perceived to be a serious and endemic problem of employment discrimination in private industry – the fact that the wage structure of "many segments of American industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same."

Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974) (quoting S. REP. No. 176, *supra*). Congress accordingly had substantial justification to conclude that pervasive discrimination existed whereby women were paid less than men for equal work. We accord these findings substantial deference, given that "Congress must have wide latitude," *City of Boerne*, 117 S. Ct. at 2164, to determine where the line lies between substantive and remedial measures. These legislative findings stand in contrast to RFRA, in which the legislative record was devoid of any reference to modern examples of the kind of unconstitutional conduct purportedly targeted by the legislation. *See City of Boerne*, 117 S. Ct. at 2169-70.

Moreover, in examining the provisions of the Equal Pay Act, we do not believe that their scope is out of proportion to the harms that Congress sought to redress. *See Goshtasby*, 141 F.3d at 772. In order to establish a claim under the Equal Pay Act, a plaintiff must demonstrate

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decision of the body constitutionally appointed to decide.' ") (quoting *Oregon v. Mitchell*, 400 U.S. 112, 207 (1970) (Harlan, J.)).

that the employer pays different wages to employees of the opposite sex "for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." 29 U.S.C. § 206(d) (1). This, however, does not automatically establish liability. Rather, employers enjoy three specific affirmative defenses: that the wage differentials are due to either (i) a seniority system, (ii) a merit system, or (iii) a system that measures wages by quantity or quality of production. *Id.* In addition, employers may avoid liability under a catch-all provision that affords a defense when the differential is "based on any other factor other than sex." *Id.* § 206(d) (1) (iv); *see also Fallon v. Illinois,* 882 F.2d 1206, 1211 (7th Cir. 1989). The broad scope of these defenses protects employers from liability when the employer has sound reasons for wage disparities ("any other factor other than sex"), but they allow for liability when no such reasons exist. We believe that these statutory provisions are reasonably tailored to remedy intentional gender-based wage discrimination. *Cf. United States v. City of Chicago,* 573 F.2d 416, 423 (7th Cir. 1978) (holding that Congress's extension of Title VII's protections to government employees was "clearly rationally related to and consistent with the 'letter and spirit' of the Fourteenth Amendment"). As we recognized in *Goshtasby,* the fact that the statute's sweep includes some constitutional conduct is not fatal. *See* 141 F.3d at 423 (quoting *City of Boerne,* 117 S. Ct. at 2163). The Equal Pay Act, unlike RFRA, does not redefine the substantive

rights of the Fourteenth Amendment, nor are its provisions out of proportion to the harms that Congress intended to remedy and deter.[14]

Thus, in light of the above, we conclude that Congress validly abrogated the University's Eleventh Amendment immunity from suit under the Equal Pay Act.

III. The Civil Rights Act of 1991

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, was amended by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 78 Stat. 253, to expressly abrogate the States' Eleventh Amendment immunity. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 448-49 (1976). Title VII's definition of "person" was amended to include "governments, governmental agencies, [and] political subdivisions," 42 U.S.C. § 2000e (a), and the term "employer" is defined as a "person" who also satisfies other statutory conditions not relevant here. *Id.* § 2000e(b). The statute also defines the term "respondent"

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[14] In a footnote to its Equal Pay Act argument, the University's Brief states: "To the extent that plaintiffs assert disparate impact claims under Title VII, those claims raise identical Fourteenth Amendment concerns." If the University is attempting to argue that, in light of *City of Boerne*, we should overrule *City of Chicago* and *Liberales*, it has waived this argument. *See, e.g., United States v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir. 1991) ("We repeatedly have made clear that perfunctory and undeveloped arguments . . . are waived (even where those arguments raise constitutional issues)."). At any rate, in light of the foregoing discussion, we see no reason to revisit those cases without the benefit of full briefing.

to include an employer. *Id.* § 2000e(n). Finally, the 1972 amendments included within the statute's definition of "employee" those individuals "subject to the civil service laws of a State government, governmental agency or political subdivision." *Id.* § 2000e(f). Title VII's enforcement provisions state that "a civil action may be brought against the respondent named in the charge . . . by the person claiming to be aggrieved," *id.* § 2000e-5 (f) (1), and that "each United States district court . . . shall have jurisdiction of actions brought under this subchapter." *Id.* § 2000e-5(f) (3). These provisions make it unmistakably clear, as the Supreme Court recognized in *Fitzpatrick*, that Congress intended to abrogate the States' Eleventh Amendment immunity under Title VII. The University argues, however, that the Civil Rights Act of 1991 (CRA) – which for the first time provided a compensatory damages remedy for Title VII plaintiffs who proved intentional discrimination, *see* 42 U.S.C. § 1981a – does not contain a similar expression of legislative intent to abrogate.

The plain language of § 1981a shows that Congress intended to create an additional remedy for Title VII violations, as opposed to a separate cause of action. The statute provides:

> In an action brought by a complaining party under section 706 . . . of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5] against a respondent who engaged in unlawful intentional discrimination . . . prohibited under section 703, 704, or 717 of the Act [42 U.S.C. 2000e-2, 2000e-3, 2000e-16], and provided that the complaining party cannot recover under [42 U.S.C. 1981], the complaining party may recover compensatory

> and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5(g)], from the respondent.

42 U.S.C. § 1981a (a) (1). As the University concedes, Congress incorporated Title VII's definitional provisions into § 1981a. These definitional provisions establish that the States, as potential "respondents," *see supra* at 22, are within the class of employers from which a "complaining party" under § 1981a may recover compensatory damages, and they are not elsewhere expressly excluded from that class. *See* 42 U.S.C. § 1981a(a) (1) & (b) (2). Section 1981a defines the term "complaining party" to include "a person who may bring an action or proceeding under title VII of the Civil Rights Act of 1964." *Id.* § 1981a(d) (1) (A). Thus, a "complaining party" in an "action brought" under Title VII may be entitled to compensatory damages by showing that a "respondent" (which includes State governments) engaged in unlawful intentional discrimination. Further, as we have indicated, Title VII confers jurisdiction upon the federal courts for "actions brought" under its provisions. *See* 42 U.S.C. § 2000e-5 (f) (3). Therefore, we conclude that the Civil Rights Act of 1991 merely creates an additional remedy for actions brought under Title VII. *See, e.g., Williams v. Banning*, 72 F.3d 552, 553 (7th Cir. 1995) ("Congress amended Title VII in the Civil Rights Act of 1991 to permit victims of unlawful intentional discrimination to collect compensatory and punitive damages. . . . "). It does not, as the University contends, create a distinct cause of action that would require its own statement of abrogation. When Congress authorized compensatory damages claims against Title

VII respondents (who may be sued in federal court), it expressed its intent to authorize such claims against the States.

Our conclusion is further buttressed by Congress's explicit *exclusion* of the States as respondents that may be subject to punitive damages claims under Title VII. *See* 42 U.S.C. § 1981a(b) (1) ("A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision). . . . "). No similar exclusion exists with respect to claims for compensatory damages. *See id* § 1981a(b) (2). Congress would have had no need to provide this explicit exception to the CRA's expanded remedies unless it understood the remainder of those remedies – including compensatory damages claims – to apply to the States. Indeed, "a limitation of liability is nonsensical unless liability existed in the first place." *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 13 (1989), *overruled on other grounds by Seminole Tribe v. Florida*, 116 S. Ct. 1114 (1996). Thus, we believe that the language of § 1981a makes clear Congress's desire to add remedies to Title VII (including a compensatory damages remedy against the States), rather than a separate cause of action. Under Title VII, the abrogation of the States' Eleventh Amendment immunity is settled. *See Fitzpatrick*, 427 U.S. at 448-49.

For the foregoing reasons, we reject the University's assertion of Eleventh Amendment immunity with respect to both the Equal Pay Act and the Civil Rights Act of

1991. We therefore affirm the decision of the district court.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals
for the Seventh Circuit

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

DR. IRIS VARNER, *et al.*,	)	
Plaintiffs,	)	
	)	Case No. 95-1355
v.	)	
ILLINOIS STATE UNIVERSITY, *et al.*,	)	
Defendants.	)	

FILED
JUL 30 1997

JOHN M. WATERS, Clerk
U.S. District Court
Central District of Illinois

ORDER

This matter is now before the Court on Magistrate Judge Robert J. Kauffman's Report & Recommendation and two Motions to Dismiss by Defendants. For the reasons set forth herein, the Report & Recommendation [# 128] is adopted in part and rejected in part, Defendants' Motion to Dismiss [#71] is granted in part and denied in part, and Defendants' Motion to Dismiss [# 18] is granted in part and denied in part as moot.

Background

The relevant facts of this case have been sufficiently set forth in the Report & Recommendation of the Magistrate Judge, as well as the prior Orders of this Court, and need not be restated here. Suffice it to say that this matter is brought on behalf of a class including any female teaching faculty at Illinois State University who was an Assistant Professor, Associate Professor, or full Professor anytime during the period beginning with the 1982-1983 academic year up to and including the present. Plaintiffs allege that the class of women has been paid less than their male counterparts, given considerations of teaching experience, the number of classes and class size they taught, academic papers published, service to the University, and other matters to go to the quality of their services. Plaintiffs further allege that Defendants engaged in retaliation against female professors who complained of their alleged employment practices.

On September 24, 1996, the Court ruled on a motion to dismiss filed with respect to the original Complaint ("Motion to Dismiss 1"). Motion to Dismiss 1 was premised upon the argument that Plaintiffs cannot proceed in federal court on any claims based on the Equal Pay Act because the State of Illinois has not consented to suit. Upon the filing of Plaintiffs' First Amended Complaint, Defendants revived this motion to dismiss, as well as a second motion to dismiss that had been filed prior to the case being transferred to this district ("Motion to Dismiss 2"). Motion to Dismiss 2 challenged Plaintiffs' ability to hold Defendants liable in their individual capacities under Title VII and the Equal Pay Act. This matter then

was referred to the Magistrate Judge under Local Rule 72.1 for a report and recommendation.

On May 22, 1997, Magistrate Judge Robert J. Kauffman entered a Report & Recommendation which recommended that the motions be granted in part and denied in part. Pursuant to Federal Rule of Civil Procedure 72(b) and 28 U.S.C. § 636(b)(1), the parties had ten (10) working days after service of the Report & Recommendation to file objections to the Magistrate Judge's decision. Objections were timely filed on behalf of both parties. Additionally, the United States sought and was granted leave to file a brief as *Amicus Curiae* with respect to the issue of sovereign immunity. This Order follows.

Discussion

In resolving a motion to dismiss, this Court must consider all well-pled facts as true and must draw all inferences in favor of the non-moving party. *Bontkowski v. First Nat. Bank of Cicero*, 998 F.2d 459, 461 (7th Cir. 1993), *cert. denied*, 114 S.Ct. 602 (1993). In ruling on a motion to dismiss, courts consider whether relief is possible under any set of facts that could be established consistent with the allegations in the Complaint. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). This Court will dismiss a claim only if it is beyond doubt that no set of facts would entitle the Plaintiffs to relief. *Venture Associates Corp. v. Zenith Data Systems Corp.*, 987 F.2d 429, 432 (7th Cir. 1993).

I. Motion to Dismiss 1-Sovereign Immunity

A. Equal Pay Act Claims

In their renewed Motion to Dismiss [#71], Defendants first allege that Plaintiffs' claims under the Equal Pay Act should be dismissed because the State of Illinois has not consented to be sued in federal court under this statute and such a suit is therefore barred by the Eleventh Amendment. Defendants rely on the Supreme Court's decision in *Seminole Tribe of Florida v. Florida*, ___ U.S. ___, 116 S.Ct. 1114, 1123 (1996), which found:

> In order to determine whether Congress has abrogated the States' sovereign immunity, we ask two questions: first, whether Congress has "unequivocally expresse[d] its intent to abrogate the immunity," *Green v. Mansour*, 474 U.S. 64, 68, 106 S.Ct. 423, 426, 88 L.Ed.2d 371 (1985); and second, whether Congress has acted "pursuant to a valid exercise of power."

Seminole Tribe, 116 S.Ct. at 1123.

When last confronted with this issue in September 1996, the Court engaged in substantial analysis of the effect of *Seminole Tribe* on suits brought pursuant to the Equal Pay Act. Ultimately, the Court determined that the portion of the Fair Labor Standards Act ("FLSA") constituting the Equal Pay Act was enacted to prohibit discrimination in pay based on sex in furtherance of the equal protection clause of the Fourteenth Amendment, which is a valid exercise of Congressional power.[1] After careful

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[1] *Cf. Crawford v. Indiana Department of Corrections*, 115 F.3d 481, 487 (7th Cir. 1997) (finding that the Americans with

consideration of the briefs submitted in connection with this issue, as well as subsequent case authority,[2] the Court remains confident that the prior decision is correct and constitutes the law of the case. To the extent that Defendants seek reconsideration of this Court's prior finding that the Equal Pay Act was properly enacted in furtherance of Congress' power under the Fourteenth Amendment, such a request is denied.

However, Defendants now argue for the first time that Congress did not clearly express its intent to abrogate the Eleventh Amendment in enacting the Equal Pay Act. As this Court's September 24, 1996 Order did not contain an in-depth discussion of this aspect of the *Seminole Tribe* test, the Court will elaborate now in the interest of making a complete record.

The intent to abrogate "must be obvious from 'a clear legislative statement.' " *Seminole Tribe*, 116 S.Ct. at 1123, *quoting Blatchford v. Native Village of Noatak*, 501 U.S. 775, 111 S.Ct. 2578, 2584 (1991). Here, the Equal Pay Act itself contains neither definitions nor enforcement provisions.

Disabilities Act, "like other antidiscrimination statutes," was an exercise of Congressional power under the Fourteenth Amendment, as well as the Commerce Clause).

[2] In *Timmer v. Michigan Department of Commerce*, 104 F.3d 833 (6th Cir. 1997), the Sixth Circuit affirmed the holding of *Marshall v. Owensboro-Daviess County Hospital*, 581 F.2d 116 (6th Cir. 1978), cited in this Court's September 24, 1996 Order. In so doing, the Sixth Circuit found that, although not expressly stated, Congress clearly and properly acted in furtherance of § 5 of the Fourteenth Amendment in extending the Equal Pay Act to state employees. *Timmer*, 104 F.3d at 838-39.

Rather, such interpretative terms and mechanisms must be drawn from the context of the remainder of the FLSA.

> The term "employer: is defined in the FLSA to "include[ ] a public agency," which in turn is defined as "the government of a State or political subdivision thereof" and any agency of a State. 29 U.S.C. §§ 203(d), (x). The term "employee" is defined to include "any individual employed by a State, political subdivision of a State, or an interstate governmental agency. *Id.* § 203 (e) (2) (C). Finally, the private enforcement provision provides that "[a]n action to recover the liability prescribed . . . may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated."

Timmer, 104 F.3d at 837-38. Such language makes it abundantly clear that Congress intended to permit actions against states and state agencies under the Equal Pay Act, thereby purposely abrogating sovereign immunity from suit.

Thus, the Court concurs with the other courts which have confronted this question with respect to the FLSA and reached the conclusion that the FLSA's current definitional and enforcement provisions, which are fully applicable to the Equal Pay Act, as well as the accompanying legislative history, provide an unmistakably clear statement of Congress' intent to abrogate the states'

sovereign immunity.[3] Accordingly, the Court finds that Congress clearly intended to abrogate the States' sovereign immunity from suit through the Equal Pay Act, and the portion of Defendants' Motion to Dismiss which requests dismissal of all claims based on the Equal Pay Act must be denied.

B. Claims for Monetary Damages

In their Objections to the Report & Recommendation, Defendants also raise the new argument that Plaintiffs' claims for monetary damages under § 1981a are barred by the Eleventh Amendment. Defendants contend that § 1981a contains no indication of any intent to abrogate sovereign immunity with respect to claims for compensatory and punitive damages, failing to satisfy the *Seminole Tribe* standard for abrogation of Eleventh Amendment immunity.

With respect to Plaintiffs' claims for punitive damages, the Court agrees with Defendants' position. Under § 1981a, governments, governmental agencies or political

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[3] *See also Brinkman v. Department of Corrections*, 21 F.3d 370, 372 (10th Cir.), *cert. denied*, 115 S.Ct. 315 (1994); *Reich v. New York*, 3 F.3d 581, 590-91 (2nd Cir. 1993), *cert. denied*, 114 S.Ct. 1187 (1994); *Hale v. Arizona*, 993 F.2d 1387, 1391-92 (9th Cir.) (en banc), *cert. denied*, 114 S.Ct. 386 (1993). Furthermore, the Court notes that the FLSA definition of "employer" and enforcement provisions at issue are substantially similar to those set forth in the Age Discrimination in Employment Act, in which context the Seventh Circuit held such provisions to evidence Congress' clear "desire to override the states' sovereign immunity." *Davidson v. Board of Governors of State Colleges & Universities*, 920 F.2d 441, 443 (7th Cir. 1990).

subdivisions are expressly excluded from liability for punitive damages. 42 U.S.C. § 1981a(b) (1). This interpretation is further supported by the relevant legislative history, which reveals that the purpose of the language in § 1981a was to establish that punitive damages are not available against state and local government defendants. *See* 137 Cong. Rec. S15445-02, S15460, S15472-01, S15484, H950501, H9527 (1991). Thus, the Court finds that Congress made no unequivocal expression of intent to abrogate the states' sovereign immunity with respect to punitive damages in enacting § 1981a, and the standard set forth in *Seminole Tribe* for a valid abrogation of sovereign immunity has not been satisfied. Accordingly, the portion of Plaintiffs' claims in Counts III and IV of the First Amended Complaint seeking punitive damages pursuant to § 1981a are barred, and Defendants' Motion to Dismiss will be granted in this respect.

Defendants also urge the Court to adopt their myopic view with respect to Plaintiffs' claim for compensatory damages and find no indication of Congressional intent in § 1981a itself. However, in considering the availability of compensatory damages, the Court finds that the appropriate analysis must reach further. It is clear that Title VII permits recovery of front pay, back pay, and other equitable relief against employers who violate its provisions but does not, as enacted, provide an avenue of relief with respect to monetary damages. *See* 42 U.S.C. § 2000e *et seq.* However, in 1991, Congress passed § 1981a to expand the remedies available to successful Title VII plaintiffs to include compensatory damages. *Blankenship v. Warren County, Virginia*, 931 F.Supp. 447, 450 (W.D.Va. 1996), *citing* H.R.Rep. No. 40(l), 102d Cong., 1st Sess. 65,

71 (1991), 1991 U.S.C.C.A.N. 549. While § 1981a does not technically amend Title VII but, rather, stands alone as a separate statutory provision, this is not dispositive. To the contrary, the Court concurs with the district court in *Blankenship* that an examination of § 1981a necessarily involves reference to the definitional and enforcement provisions of Title VII.

Section 1981a provides:

> In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 . . . against a respondent who engaged in unlawful intentional discrimination . . . prohibited under section 703, 704, or 717 of the Act . . . and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in additional [sic] to any relief authorized by section 706(g) of the Civil Rights Act of 1964 . . . from the respondent.

42 U.S.C. § 1981a(a) (1). Although a complaining party includes "a person who may bring an action or proceeding under Title VII of the Civil Rights Act of 1964," 42 U.S.C. § 1981a(d) (1) (A), the term "respondent" is not defined by § 1981a. However, by its own terms, § 1981a looks to § 2000e to give meaning to its provisions. *Sattar v. Unocal Corp.*, 829 F.Supp. 331, 333 n.3 (N.D.Cal. 1993).

> To determine who qualifies as a respondent, one has no recourse but to look to § 2000e-5(b), which defines "respondent" as, *inter alia*, an "employer." . . . [I]t is beyond cavil that employers under Title VII include state employers. Therefore, § 1981a, which permits

> suits against respondents, allows suits against state employers as well.

Blankenship, 931 F.2d at 450. In other words, the term " '[r]espondent' can only be interpreted by reference to § 2000e and, thus, to the use of the word 'employer'." *Sattar*, 829 F.Supp. at 333 n.3.

Thus, the Court finds that by including the references to Title VII in the text of § 1981a and failing to provide an alternative definition, Congress expressed its intent that Title VII supply the definition of "respondent" for purposes of assessing liability under § 1981a. This, in combination with the other overt references to Title VII's enforcement and definitional provisions in the text of § 1981a, evidences Congress' intent in enacting § 1981a to supplement the remedies available under Title VII and expand its prior abrogation of the states' sovereign immunity. Furthermore, the legislative history of § 1981a evidences Congress' understanding that the provisions concerning compensatory damages would apply to the states. *See* 137 Cong. Rec. H9505-01, H9527 (1991) ("By reference to sections 703, 704 and 706 of Title VII, the statutory language of section [1981a] is explicit that compensatory damages are available against state and local governmental defendants. . . . "); 137 Cong. Rec. S15472-01, § S15484 (1991) ("[C]ompensatory damages may be awarded against federal, state and local government agencies. . . . "). Accordingly, in applying the first step of the two-part analysis set forth in *Seminole Tribe*, the Court concludes that Congress has provided a clear statement of its intent to subject states to claims for compensatory damages pursuant to § 1981a in federal court.

The second part of the *Seminole Tribe* analysis requires that Congress act "pursuant to a valid exercise of power" in attempting to abrogate sovereign immunity. 116 S.Ct. at 1123. In enacting § 1981a, Congress sought to expand the remedies available to plaintiffs in Title VII actions. The Supreme Court has held that Title VII constitutes a valid abrogation of the states' Eleventh Amendment immunity because Congress acted in furtherance of the Fourteenth Amendment, "which operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment." *Seminole Tribe*, 116 S.Ct. at 1128; *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666 (1976). Like Title VII, § 1981a provides additional remedies against discrimination in the workplace on account of sex, and Defendants cannot reasonably argue that Congress lacks power to provide remedies for discrimination under § 5 of the Fourteenth Amendment. As such, the Court finds that § 1981a is an anti-discrimination measure that may be viewed as an exercise of Congress' power to adopt legislation enforcing the Fourteenth Amendment's guarantee of equal protection of the law. Therefore, under *Seminole Tribe*, sovereign immunity would not insulate the State of Illinois from suit for compensatory damages pursuant to § 1981a, and Defendants' Motion to Dismiss 1 must be denied with respect to Plaintiffs' claims for compensatory damages in Counts III and IV.

II. Motion to Dismiss 2-Individual Liability

A. Equal Pay Act Claims

Defendants assert that the Equal Pay Act does not permit suits against defendants in their individual capacities. Although the Seventh Circuit has found that an individual employee may be named in lieu of the employer in an Equal Pay Act claim, *Riordan v. Kempiners*, 831 F.2d 690, 694 (7th Cir. 1987), the Court of Appeals did not decide the precise issue of whether an individual employee may be named in addition to the employing entity in this context. However, this issue has been addressed by other district courts in this circuit. In *Pommier v. James L. Edelstein Enterprises*, the Honorable Marvin E. Aspen held that the definition of the term "employer" as used in both the Equal Pay Act and Title VII is "identical," and case law in the Title VII area directs that an individual supervisor cannot be held personally liable for Equal Pay Act violations made as agent of the employer. 816 F.Supp. 476, 481 (N.D.III. 1993), *citing Weiss v. Coca-Cola Bottling Co. of Chicago*, 772 F.Supp. 407, 412 (N.D.III. 1991). The district judge in *Weiss* likewise concluded that allegations against an individual regarding actions that were taken as an agent of the employer cannot result in individual liability. 772 F.Supp. at 412. *See also Jaskowski v. Rodman & Renshaw, Inc.*, 842 F.Supp. 1094, 1098 (N.D.III. 1994) (recognizing that neither Title VII nor the Equal Pay Act permits suits against individuals.)[4]

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[4] The Court also notes that although the decisions in *Witham v. Regency Savings Bank*, 1995 WL *723888* (N.D.III. December 5, 1995), and *Equal Employment Opportunity Commission v. Home by Hemphill. Inc.*, 1995 WL 683502 (N.D.III,

Whereas the Equal Pay Act derives its definition of "employer" from the Fair Labor Standards Act and "includes *any person acting directly or indirectly in the interest of an employer* in relation to an employee and includes a public agency," 29 U.S.C. § 203(d) (emphasis added), "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and *any agent of such a person*" is an employer under Title VII. 42 U.S.C. § 2000e(b) (emphasis added). Although this Court does not agree that the definitions of "employer" in Title VII and the Equal Pay Act are identical, the definitions may be functionally equivalent as applied. Furthermore, the remedies available under the applicable sections of the Equal Pay Act include unpaid minimum wages or unpaid overtime compensation, liquidated damages, reinstatement, and promotion. 29 U.S.C. § 216(b). Like the remedies available under Title VII, these are remedies which are more likely provided by an employer rather than an individual, and the language of the Equal Pay Act uses the term "employer" in the context of the entity

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November 16, 1995), technically allow allegations of individual liability under the Equal Pay Act to survive a motion to dismiss, the Court finds these opinions unpersuasive. In *Witham*, the Honorable Milton I. Shadur expressly stated that the court would be willing to entertain a motion for dismissal of the individual claim that was "properly supported by persuasive authority." 1995 WL 723888 at *1. Similarly, although leave to replead was granted, the decision in *Hemphill* actually dismissed the claim of individual liability as insufficient. 1995 WL 683502 at *3.

paying the disparate wages. 29 U.S.C. §§ 216(b), 206(d)(1).

Additionally, the Court's review of the First Amended Complaint reveals that Plaintiffs' allegations against the named Defendants are directed toward actions purportedly taken by these persons in their capacities as agents for Illinois State University. Plaintiffs do not allege that any of these persons was acting outside the scope of their official capacities at the time they engaged in violations of the Equal Pay Act. Thus, there does not appear to be a basis for imposing personal liability against these individuals. Accordingly, this aspect of the Report & Recommendation is rejected, and Plaintiffs' claims against Defendants in their individual capacities are dismissed from Counts I and II.

B. Title VII Claims

In the Motion to Dismiss 2, Defendants also contend that they cannot be sued in their individual capacities for violations of Title VII and ask that Plaintiffs' claims in this regard be dismissed. In the Report & Recommendation, the Magistrate Judge concurs and recommends that Defendants' Motion to Dismiss the Title VII claims against the individuals in Counts III and IV, be granted. However, this Court's review of the Amended Complaint reveals that Counts III and IV, as amended, do not state any claim against Defendants in their individual capacities. Accordingly, the Court rejects this portion of the Report & Recommendation. This aspect of Motion to Dismiss 2 will be denied as moot.

CONCLUSION

For the reasons set forth herein, the Report & Recommendation is ADOPTED in part and REJECTED in part. Defendants' Motion to Dismiss [#71] is GRANTED IN PART and DENIED IN PART, and Defendants' Motion to Dismiss [#18] is GRANTED IN PART and DENIED IN PART AS MOOT. The previously imposed stay is now lifted, and this matter is referred to Magistrate Judge Kauffman for further proceedings.

ENTERED this 30th day of July, 1997.

/s/ Michael M. Mihm
MICHAEL M. MIHM
Chief United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF ILLINOIS

DR. IRIS VARNER, *et al*	)	
Plaintiff	)	Case No.
	)	95-1355
vs.	)	
ILLINOIS STATE UNIVERSITY, *et al*	)	
	)	
Defendants	)	

FILED

MAY 22 1997

JOHN M. WATERS, Clerk
U.S District Court
Central District of Illinois

REPORT AND RECOMMENDATION

Now before the court are the defendants' Motions to Dismiss (#18 and #71), which were revived by motion following the filing of Plaintiffs' First Amended Complaint. The motions are fully briefed, and oral arguments were heard on February 27. Pursuant to Local Rule 72.1, the district judge has referred the matter to me for a report and recommendation. After carefully considering all of the submissions of the parties, and pursuant to 28 U.S.C. § 636(b)(1)(B), I recommend that the motions be granted in part and denied in part.

PROCEDURAL BACKGROUND

Plaintiffs Iris Varner, Teresa Palmer, and Paula Pomerenke, on behalf of themselves and a certified class, allege that defendants have violated the Equal Pay Act of 1963, Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991 (§ 1981), and the Civil Rights Act of 1871 (§ 1983).

Plaintiffs are all tenure track faculty at Illinois State University. Defendants are Illinois State University, four officials of the University, and members of the Board of Regents and its successor Board of Trustees in their official capacities. (The caption of the complaint indicates that these individuals are sued in both individual and official capacities. However, the body of the complaint reveals that relief is sought against the individuals in their official capacities only.)

The complaint was originally filed in the Northern District of Illinois. Upon a Motion to Dismiss or Transfer, Judge Zagel granted the motion to transfer and denied the motion to dismiss. A second motion to dismiss, filed after transfer to this court, was granted in part and denied in part by Judge Mihm, after which plaintiffs filed the First Amended Complaint.

The First Amended Complaint consists of five counts. Counts I and II, against the University and the board members in their official capacities, allege sex discrimination and retaliation in violation of the Equal Pay Act. Counts III and IV are also against the University and members of the board in their official capacities; these Counts claim violations of Title VII and § 1981. Count V

alleges a violation of § 1983 against the individual defendants in their official capacity. After the amended complaint was filed, Defendants moved to revive the previous motions as they related to the amended complaint, a motion that was allowed.

Because one of the issues raised in the second motion to dismiss was the constitutionality of the two statutes at issue, the United States Attorney General was notified. Although the United States subsequently declined to intervene, the Attorney General requested that the court consider briefs on the same issue that had been filed in another case currently pending in this court.

The constitutional issue raised is whether Congress properly abrogated State immunity from Equal Pay Act liability under the Eleventh Amendment and *Seminole Tribe of Florida v. Florida*, U.S., 116 S. Ct. 1114, 134 L.Ed.2d 252 (1996). In an Order dated September 24, 1996, resolving the second motion to dismiss, Judge Mihm ruled that Congress had properly abrogated Illinois' sovereign immunity and that the State was not insulated from suit under the Equal Pay Act. Because this issue has been resolved in this case by the District Judge, I decline to reconsider the issue, believing the Order to constitute law of the case. To the extent the defendants had wished to revive this portion of the earlier motions, they may take up the Eleventh Amendment issues in objections to this Report and Recommendation.

The other issue raised is whether suit against the individual defendants is proper. That issue will be addressed in this Report and Recommendation.

MOTIONS TO DISMISS

A complaint should not be dismissed unless it appears from the pleadings that the plaintiff could prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41 (1957); *Gould v. Artisoft, Inc.*, 1 F.3d 544, 548 (7th Cir. 1993). Rather, it should be construed broadly and liberally in conformity with the mandate in Rule 8(f).

For purposes of a motion to dismiss, the complaint is construed in the light most favorable to the plaintiff; its well-pleaded factual allegations are taken as true, and all reasonably-drawn inferences are drawn in favor of the plaintiff. *Albright v. Oliver*, 510 U.S. 266, 268 (1994); *Hishon v. King*, 467 U.S. 69 (1984); *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *MCM Partners v. Andrews-Bartlett & Assoc., Inc.*, 62 F.3d 967, 969 (7th Cir. 1995); *Early v. Bankers Life & Cas. Co.*, 959 F.2d 75 (7th Cir. 1992); *Yeksigean v. Nappi*, 900 F.2d 101 (7th Cir. 1990). In addition, a complaint must contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory. *Sutliff, Inc. v. Donovan Cos.*, 727 F.2d 648 (7th Cir. 1984). If the plaintiff's claim as plead is "without legal consequence," dismissal is proper; *Grzan v. Charter Hospital*, 104 F.3d 116, 119 (7th Cir. 1997).

DISCUSSION

A. Individual liability under the Equal Pay Act

The Equal Pay Act, 29 U.S.C. § 206(d) (EPA), is part of the Fair Labor Standards Act (FLSA). The latter statute defines "employer" as "any person acting directly or

indirectly in the interest of an employer in relation to an employee and includes a public agency . . . " 29 U.S.C. § 203(d). "Public agency" means "the government of a State or political subdivision thereof; any agency of . . . a State, or a political subdivisions [sic] of a State." 29 U.S.C. § 203(x). "Person" includes "an individual." 29 U.S.C. § 203(a).

There are cases discussing individual liability under the EPA but this is an issue not yet addressed by the Supreme Court. The Seventh Circuit has mentioned it in dicta, *Riordan v. Kempiners*, 831 F.2d 690, 694-5 (7th Cir. 1987), but that reference seems to cut against defendants' position:

> For reasons unclear to us, [plaintiff's] lawyer decided to name . . . the director of the Department [] as the only defendant to her suit under the Equal Pay Act. The word "employer" is defined broadly enough in the Fair Labor Standards Act (of which the Equal Pay Act is an amendment) to permit naming another employee rather than the employer as defendant, provided the defendant had supervisory authority over the complaining employee and was responsible in whole or part for the alleged violation.

Id. at 694.

The Northern District of Illinois has ruled on the issue directly several times with inconsistent results. *See, Jaskowski v. Rodman & Renshaw, Inc.*, 842 F.Supp. 1094, 1098 (N.D.Ill. 1994) (finding individual liability under EPA); *Pommier v. James L. Edelstein Enter.*, 816 F.Supp. 476 (N.D.Ill. 1993) (same); and *Weiss v. Coca-Cola Bottling Co.*,

772 F.Supp. 407 (N.D.Ill. 1991) (same); *but see, EEOC v. Home by Hemphill, Inc.*, No. 95 C1138, 1995 WL 683502 (N.D.Ill. Nov. 16, 1995) (rejecting individual liability under EPA); and *Witham v. Regency Savings Bank*, 1995 WL 680313 (N.D.Ill. Nov. 13, 1995) (same). *See also, Bergstrom v. Univ. of New Hampshire*, 943 F.Supp. 130 (D.N.H.1996) (rejecting individual liability and criticizing *Pommier* as "thinly reasoned" and based in part on the erroneous conclusion that "employer" is defined identically in the EPA and Title VII). *Cf., Freemon v. Foley*, 911 F.Supp. 326 (N.D.Ill. 1995) (finding individual liability under Family and Medical Leave Act, which adopts definition of "employer" from FLSA).

In my opinion, the definition of "employer" in the FLSA clearly and unambiguously includes individuals. The cases cited above that have concluded differently have, as the New Hampshire court pointed out, simply assumed that the statutory definition is the same as is contained in Title VII and other employment statutes. It is not. Under the EPA, an individual may be held liable.

However, that conclusion does not mean that all individual co-employees, supervisors, officers and board members are accountable under the EPA. To determine if any "person" is an employer, courts look to such factors as the powers to hire and fire, to supervise and control work schedules or conditions of employment, to set rate and method of payment, and to maintain employment records. See, *Keenan v. Allan*, 889 F.Supp. 1320 (E.D.Wash. 1995), *aff'd*, 91 F.3d 1275. Accord, *Brock v. Hamad*, 867 F.2d 804 (4th Cir. 1989) (power to hire and direct employees); *U.S. Dept of Labor v. Cole Enter., Inc.*, 62 F.3d 775 (6th Cir.

1995) (CEO with significant ownership interest, significant control of business operation, power to determine salaries and to make hiring decisions is employer). These powers need not be exclusively exercised by the "person" who has been sued. *Freemon*, 911 F.Supp. 326; *Reich v. Cole Enter., Inc.*, 901 F.Supp. 255 (S.D.Ohio 1993) *aff'd*, 62 F.3d 775. If a director or officer has sufficient control over the entity that his decisions determine if a violation of the FLSA occurred, then the FLSA considers that "person" to be the "employer." *Dole v. Simpson*, 784 F.Supp. 538 (N.D.Ind.1991).

I believe the plaintiff's First Amended Complaint contains sufficient allegations to withstand a motion to dismiss. It may or may not be possible for plaintiff to develop evidence as to each of these individuals sufficient to withstand summary judgment, but that is an issue for another day. I recommend that the motion to dismiss the EPA claims against the individual defendants be denied.

B. Individual Liability under Title VII as amended

In *Williams v. Banning*, 72 F.3d 552 (7th Cir. 1995), the Seventh Circuit clearly held that there is no Title VII liability for individuals, unless the individual meets the statutory definition of "employer" independently of the entity. Otherwise, under Title VII, only the entity that is the employer is subject to suit.

Accord, Geier v. Medtronic, Inc., 99 F.3d 238 (7th Cir. 1996) (supervisor does not fall within Title VII definition of employer); *Bryson v. Chicago State Univ.*, 96 F.3d 912

(7th Cir. 1996) (in sexual harassment Title VII suit in which supervisor was sued in official capacity, proper defendant was University not supervisor; summary judgment for supervisor affirmed).

The individuals named as defendants in this suit are not "employers." *See, Feltner v. Partyka,* 945 F.Supp.1188 (N.D.Ill.1996) (owners of company not "employers"); *Fernandez v. Wolff,* 919 F.Supp. 1120 (N.D.Ill. 1996) (university president and dean not "employers"); *Vakharia v. Little Company of Mary Hosp.,* 917 F.Supp. 1282 (N.D.Ill. 1996) (hospital officers not "employers"); *Whitechurch v. Apache Products Co.,* 916 F.Supp. 809 (N.D.Ill. 1996) (CEO not "employer"); *Briggs v. North Shore Sanitary Dist.,* 914 F.Supp.245 (N.D.Ill. 1996) (board of trustees member not "employer"). They are therefore not subject to suit under Title VII.

For this reason, I recommend that defendants' motion to dismiss the Title VII claims against the individuals in Counts III and IV be granted.

C. Conclusion

For the reasons stated above, I recommend that defendants' motion be granted as to the Title VII claims asserted in Counts III and IV and denied as to all other issues. Plaintiff should be directed to file an amended complaint. The parties are advised that any objection to this Report and Recommendation must be filed in writing with the Clerk within ten (10) working days after service of this Report and Recommendation. Fed.R.Civ.P.72(b); 29 U.S.C.636(b)(1). Failure to object will constitute a waiver

of objections on appeal. *Video Views Inc. V. Studio 21, Ltd.*, 797 F.2d 538 (7th Cir. 1986).

ENTER this 22nd day of May, 1997.

/s/ Robert J. Kauffman
ROBERT J. KAUFFMAN
United States Magistrate Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

DR. IRIS I. VARNER, DR. TERESA M. PALMER, and DR. PAULA J. POMERENKE, on their own behalf and on behalf of all others similarly situated, *Plaintiffs,* v. ILLINOIS STATE UNIVERSITY; ROBERT W. JEFFERSON, Dean; DAVID STRAND, Provost; JOHN K. URICE, Vice President and Provost; THOMAS P. WALLACE, President; the Board of Regents; including DAVID T. MURPHY; CAROL K. BURNS; JOSEPH B. EBBESEN; CARL E. KASTEN; NANCY J. MASTERSON; PATRICIA A. MCKENZIE; JAMES W. MYLES; BARBARA SCHEIBLING; NIRANJAN SHAH; and WILLIAM SULASKI, individually and in their capacity as members of the Board of Regents, *Defendants.*	Case No. 95-1355

FILED
SEP 24 1996

JOHN M. WATERS, Clerk
U.S. DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

ORDER

This matter is before the Court on Defendants' Motion to Dismiss [#71] and Plaintiffs' Motion to Vacate Prior Order and for Extension of Time [#81]. For the reasons set forth below, the Defendants' Motion is GRANTED in part and DENIED in part, and Plaintiffs' Motion is DENIED.

Background

On March 13, 1995, three female professors employed at Illinois State University ("the University"), Dr. Iris I. Varner, Dr. Teresa M. Palmer, and Dr. Paula J. Pomerenke, filed a Complaint against Illinois State University, four officials of Illinois State University, the Board of Regents, and the ten members of the board. The Complaint has been certified, as a class action on behalf of any female teaching faculty at Illinois State University who was an Assistant Professor, Associate Professor, or full Professor anytime during the period beginning with the 1982-1983 academic year up to and including the present.

The named Plaintiffs have been employed by the University as teaching faculty (in the case of one Plaintiff since 1969). Drs. Varner, Palmer, and Pomerenke allege that from the dates of their respective employment, they have been paid less than their male counterparts, given considerations of teaching experience, the number of classes and class size they taught, academic papers published, service to the University, and other matters to go to the quality of their services. The Complaint further alleges that the Defendants engaged in retaliation against

female professors who complained of the Defendants' alleged employment practices.

Jurisdiction

Plaintiffs brought this suit pursuant to the Equal Pay Act, 29 U.S.C. § 201, *et seq.*; Title VII of the Civil Rights Act, 42 U.S.C. § 2000, *et seq.*; and the *Civil* Rights Act of 1991, 42 U.S.C. § 1981, *et seq.* This Court has jurisdiction of this action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000, *et seq.*; the Equal Pay Act of 1963, 29 U.S.C. § 201, *et seq.*; and the Civil Rights Act of 1991, 42 U.S.C. § 1981, *et seq.*

Discussion

In resolving a motion to dismiss, this Court must consider all well-pled facts as true and must draw all inferences in favor of the non-moving party. *Bontkowski v. First Nat. Bank of Cicero*, 998 F.2d 459, 461 (7th Cir.), *cert. denied*, 114 S.Ct. 602 (1993). In ruling on a motion to dismiss, courts consider whether relief is possible under any set of facts that could be established consistent with the allegations in the Complaint. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). This Court will dismiss a claim only if it is beyond doubt that no set of facts would entitle the Plaintiffs to relief. *Venture Associates Corp. v. Zenith Data Systems Corp.*, 987 F.2d 429, 432 (7th Cir. 1993).

On August 14, 1996, Defendants filed a Motion to Dismiss, to which Plaintiffs filed a Response instanter on September 10, 1996. In support of their Motion to Dismiss, Defendants make the following arguments: (1) By

adding a Defendant, Plaintiffs have amended the pleadings and should file an amended complaint; and (2) Plaintiffs cannot proceed in federal court on any claims based on the Equal Pay Act because the State of Illinois has not consented to suit. Each of these arguments will be addressed in turn.

John Urice ("Urice") was initially named as a Defendant in this case. However, Judge James B. Zagel of the Northern District of Illinois dismissed Urice in an Order dated August 18, 1995 because Urice was not alleged to have participated in the basic claims of gender discrimination and had been sued in his individual capacity. Plaintiffs then filed a related suit making similar allegations against Urice, Case No. 96-1355. On July 15, 1996, Plaintiffs filed a Motion before this Court to add Urice as a Defendant once again. The Court granted Plaintiffs' Motion on July 26, 1996, stating that Urice was to be added as a named Defendant in this case, and Plaintiffs were to submit a voluntary dismissal regarding the related case against Urice. To date, Plaintiffs have taken no steps to implement this Court's Order.

Plaintiffs have not only failed to file an amended complaint adding Urice to the present case, but they have also failed to dismiss the related action. Rather, Plaintiffs state that they are exercising "an abundance of caution" and have moved to vacate the order they requested adding Urice as a Defendant in order "to keep the Title VII and § 1981 claims presented in 96-1355 separate from the issues raised by Defendants under the Equal Pay Act." (Plaintiffs' Resp. to Mot. to Dismiss at 2.) Plaintiffs have presented no logical or practical reason why two separate suits should be conducted based on the same set

of facts and similar issues. Accordingly, Plaintiffs' Motion to Vacate Prior order is denied.

Defendants argue that adding a party generally requires an amendment to the Complaint. In the present case, they claim that the addition of Urice as a Defendant requires Plaintiffs to file an amended complaint because there are no allegations currently pending against him as a result of Judge Zagel's previous Order dismissing Urice from the case. Thus, without an amended complaint, Defendants claim that it is not currently possible to determine what allegations are pending against Urice.

While notice pleading may not require a plaintiff to plead in great detail, Rule 8 does require sufficient clarity to determine that "the pleader is entitled to relief." Fed. R. Civ. P. 8(a) (2).

> The primary purpose of these provisions is rooted in fair notice: Under Rule 8, a complaint "must be presented with intelligibility sufficient for a court or opposing party to understand whether a valid claim is alleged and if so what it is."

Vicom, Inc. v. Harbridge Merchant Services, Inc., 20 F.3d, 771, 775 (7th Cir. 1994) (citations omitted). The Court also noted that a properly pled complaint allows the defendant to formulate an answer. *Id.* at 776. Additionally, "[w]here an amendment of pleadings is necessary for purposes of clarity or otherwise, after parties have been added, the complaint should be amended." *Fair Housing Development Fund Corp. v. Burke*, 55 F.R.D. 414, 415 (D.C.N.Y. 1972) (quoting *Bartels v. Sperti, Inc.*, 73 F.Supp. 751 (S.D.N.Y. 1947)).

The Court granted Plaintiffs' Motion to add Urice as a Defendant with the understanding that the claims raised in the related case were similar to those raised in the present case and involved the same set of basic facts. In doing so, the Court sought to eliminate unnecessary duplication and maximize judicial efficiency. However, Plaintiffs have not amended their Complaint to add Urice. Based on Judge Zagel's previous dismissal of Urice from this case, principles of res judicata prevent Urice from being called upon once again to answer the same Complaint. To the extent that Defendants' Motion requests that the entire suit be dismissed on these grounds, that portion of the Motion to Dismiss is denied. Nevertheless, the portion of Defendants' Motion to Dismiss requesting that Urice be dismissed for failure to file an amended complaint stating any allegations against Urice is granted. Plaintiffs have 21 days to file an Amended Complaint in this case including allegations against Urice and to voluntarily dismiss the related suit, Case No. 96-1355, in compliance with this Court's July 26, 1996 Order.

Defendants ask the Court to confirm that Urice, like the other Defendants in the case, may only be sued in his official capacity. Judge Zagel's August 18, 1995 Order held that Title VII did not permit suits against supervisory employees and dismissed all claims against Defendants in their individual capacities. However, Judge Zagel refused to dismiss claims against Defendants in their individual capacities with respect to the Equal Pay Act claims, with the exception of Urice. Thus, with respect to Title VII claims, Urice, like the other Defendants, may only be sued in his official capacity, but no

such restriction would apply with respect to Equal Pay Act claims or other claims that may be made against Urice in the Amended Complaint.

In their Motion to Dismiss, Defendants also allege that any claims based on the Equal Pay Act or other parts of the Fair Labor Standards Act should be dismissed because the State of Illinois has not consented to suit in federal court and such a suit therefore is prohibited by the Eleventh Amendment. Defendants cite *Seminole Tribe of Florida v. Florida, U.S.*, 116 S.Ct. 1114 (1996), for the proposition that this Court lacks jurisdiction over these claims because Congress did not expressly waive the sovereign immunity afforded by the Eleventh Amendment to the United States Constitution.

In *Seminole Tribe*, the Court examined a provision of the Indian Gaming Regulatory Act ("the Act"), 25 U.S.C. § 2710(d) (3) (A), which requires that States negotiate in good faith with Indian tribes. The Act authorizes an Indian tribe to sue a State for breaching the duty to negotiate in good faith. 25 U.S.C. § 2710(d) (7). The Court found that Congress did not have the authority to waive Eleventh Amendment immunity under the Indian Commerce Clause and, therefore, federal courts do not have jurisdiction to hear cases arising under the Act because the State had not consented to suit. *Seminole Tribe*, 116 S.Ct. at 1132-33.

Prior to the expansive view of sovereign immunity expressed in *Seminole Tribe*, the Supreme Court had recognized congressional authority to abrogate a state's sovereign immunity when legislation was enacted pursuant to either § 5 of the Fourteenth Amendment or the Interstate

Commerce Clause, based on *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666 (1976), and *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S.Ct. 2273 (1989), respectively. *Seminole Tribe*, 116 S.Ct. at 1125. The Court overruled its prior holding in *Union Gas*, stating that "both the result in *Union Gas* and the plurality's rationale depart from our established understanding of the Eleventh Amendment and undermine the accepted function of Article III." *Id.* The Court found that Congress could not overcome the jurisdictional bar of the Eleventh Amendment when legislating pursuant to the Interstate Commerce Clause because "Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction" by Article III. *Id.* at 1132. However, the Court did not disturb its prior decisions with respect to legislation enacted pursuant to the Fourteenth Amendment, "which operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment." *Id.* at 1128. Thus, in the wake of *Seminole Tribe*, the only source of congressional authority capable of abrogating sovereign immunity under the Eleventh Amendment that has been recognized by the Supreme Court is legislation enacted pursuant to § 5 of the Fourteenth Amendment.

As noted by the Defendants, the Equal Pay Act is part of the Fair Labor Standards Act of 1938 ("FLSA"). Congress expressly stated that it was enacting the FLSA pursuant to its power under the Commerce Clause:

> It is declared to be the policy of this chapter, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as

> practicable to eliminate the conditions above referred to in such industies [sic] without substantially curtailing employment or earning power.

29 U.S.C. § 202(b); *see also Marshall v. City of Sheboygan*, 577 F.2d 1, 6 (7th Cir. 1978) (finding that the Equal Pay Act is a valid exercise of Congress' power under the Commerce Clause).

Plaintiffs admit that the FLSA was enacted pursuant to Congress' power under the Commerce Clause but argue that the portion of the FLSA constituting the Equal Pay Act was enacted in furtherance of the equal protection clause of the Fourteenth Amendment and therefore should be undisturbed by *Seminole Tribe*, citing *Marshall v. Owensboro-Daviess County Hospital*, 581 F.2d 116 (6th Cir. 1978), in support of this position. In *Marshall*, the Sixth Circuit found that the Equal Pay Act amendments to the FLSA were authorized by § 5 of the Fourteenth Amendment. *Id.* at 119 (quoting *Usery v. Allegheny County Institution Dist.*, 544 F.2d 148 (3rd Cir. 1976), *cert. denied*, 430 U.S. 946, 97 S.Ct. 1582 (1977), and *Usery v. Charleston County School Dist.*, 558 F.2d 1169 (4th Cir. 1977).

In *Allegheny County*, the Third Circuit rejected the proposition that because the Equal Pay Act is housed within the FLSA and uses its administrative and enforcement mechanisms, it is necessarily a Commerce Clause enactment. 544 F.2d at 155. Rather, "the Equal Pay Act is a separate law, enacted at a different time, and aimed at a separate problem – discrimination on account of sex in the payment of wages" and "Congress has § 5 fourteenth amendment power to prohibit sex discrimination." *Id.*

The Fourth Circuit adopted this view in *Charleston County* adding that, unlike the other provisions of the FLSA:

> [T]he Equal Pay Act is an anti-discrimination measure; and, as such, may be viewed as an exercise of Congress' power to adopt legislation enforcing the Fourteenth Amendment's guarantee of equal protection of the law.

558 F.2d at 1170.

The Seventh Circuit has adopted analogous reasoning with respect to the Age Discrimination in Employment Act ("ADEA"), which was also amended to authorize suits against state, and local governments. *Equal Employment Opportunity Commission v. Elrod*, 674 F.2d 601 (7th Cir. 1982). In *Elrod*, the Seventh Circuit set forth the test for determining whether legislation is enacted pursuant to § 5 of the Fourteenth Amendment as "whether the *objectives* of the legislation are 'within Congress' power under the amendment." 674 F.2d at 608 (emphasis in original).

The Seventh Circuit found that despite the fact that the ADEA was enacted pursuant to the Commerce Clause, it was also a valid exercise of Congress' power under the Fourteenth Amendment. *Id.* at 603; *see also, Davidson v. Board of Governors of State Colleges*, 920 F.2d 441, 443 (7th Cir. 1990). Prohibiting arbitrary or discriminatory government conduct is the "very essence" of the guarantee of equal protection under the Fourteenth Amendment. *Elrod*, 674 F.2d at 604. This reasoning is also consistent with the reasoning of the Supreme Court with regard to Title VII in *Fitzpatrick*, which was affirmed in *Seminole Tribe*, 116 S.Ct. at 1125, 1128.

In light of the Seventh Circuit's reasoning in connection with the ADEA cases, this Court agrees with the position taken by the Third, Fourth, and Sixth Circuits that the portion of the FLSA constituting the Equal Pay Act was enacted to prohibit discrimination in pay based on sex in furtherance of the equal protection clause of the Fourteenth Amendment. Therefore, sovereign immunity would not insulate the State of Illinois from suit under *Seminole Tribe*. Accordingly, the portion of Defendants' Motion requesting dismissal of all claims based on the Equal Pay Act is denied.

CONCLUSION

For the reasons set forth herein, the portion of Defendants' Motion to Dismiss [#71] requesting dismissal with leave to file an amended complaint adding Urice as a defendant is GRANTED and the portion requesting dismissal of the Equal Pay Act claims is DENIED. Plaintiffs' Motion to Vacate Prior Order and for Extension of Time [#81] is DENIED. Plaintiffs have 21 days to file an Amended Complaint in this case including allegations against Urice and to voluntarily dismiss the related suit, Case No. 96-1355. This case is referred to Magistrate Judge Robert J. Kauffman.

ENTERED this 24th day of September, 1996.

/s/ Michael M. Mihm
MICHAEL M. MIHM
Chief United States
District Judge

United States Court of Appeals

For The Seventh Circuit
Chicago, Illinois 60604

November 8, 2000

Before

Hon. JOEL M. FLAUM, Chief Judge

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. HARLINGTON WOOD, JR. Circuit Judge

DR. IRIS I. VARNER, et al., Plaintiffs-Appellees, No. 97-3253 v. ILLINOIS STATE UNIVERSITY, et al. Defendants-Appellants.	Appeal from the United States District Court for the Central District of Illinois, Peoria Division. No. 95 C 1355 Michael M. Mihm, *Judge*.

ORDER

On consideration of the petition for rehearing and petition for rehearing en banc filed in the above-entitled case on October 23, 2000, by defendants-appellants, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

FAIR LABOR STANDARDS ACT
29 U.S.C. §§ 201, *et seq.*

§ 203. Definitions

As used in this chapter –

* * *

(e)(1) Except as provided in paragraphs (2), (3), and (4) the term "employee" means any individual employed by an employer.

(2) In the case of an individual employed by a public agency, such term means –

(A) any individual employed by the Government of the United States –

(i) as a civilian in the military departments (as defined in section 102 of Title 5),

(ii) in any executive agency (as defined in section 105 of such title),

(iii) in any unit of the judicial branch of the Government which has positions in the competitive service,

(iv) in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces,

(v) in the Library of Congress, or

(vi) the Government Printing Office;

(B) any individual employed by the United States Postal Service or the Postal Rate Commission; and

(C) any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual –

(i) who is not subject to the civil service laws of the State, political subdivision, or agency which employs him; and

(ii) who –

(I) holds a public elective office of that State, political subdivision, or agency,

(II) is selected by the holder of such an office to be a member of his personal staff,

(III) is appointed by such an officeholder to serve on a policymaking level,

(IV) is an immediate advisor to such an officeholder with respect to the constitutional or legal powers of his office, or

(V) is an employee in the legislative branch or legislative body of that State, political subdivision, or agency and is not employed by the legislative library of such State, political subdivision, or agency.

* * *

(x) "Public agency" means the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Rate Commission), a State, or a political subdivision of a State; or any interstate governmental agency.

§ 206. Minimum Wage

* * *

Prohibition of sex discrimination

(d)(1) No employer having employees subject to any provisions of this section shall discriminate, within

any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided,* That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

§ 216. Penalties

* * *

(b) Damages; right of action; attorney's fees and costs; termination of right of action

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215 (a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215

(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215 (a)(3) of this title.

CONSTITUTION OF THE STATE OF ILLINOIS

Date Effective
Adopted at Special Election on December 15, 1970
General Effective July 1, 1971

ARTICLE I. BILL OF RIGHTS

§ 18. No Discrimination on the Basis of Sex

The equal protection of the laws shall not be denied or abridged on account of sex by the State or its units of local government and school districts.

CHAPTER 775
HUMAN RIGHTS

ACT 5. ILLINOIS HUMAN RIGHTS ACT

ARTICLE 1. TITLE, POLICY AND DEFINITIONS
775 ILCS 5/1-101

5/1-101. Short title

§ 1-101. Short Title. This Act shall be known and may be cited as the Illinois Human Rights Act.

775 ILCS 5/1-102

5/1-102. Declaration of policy

§ 1-102. Declaration of Policy. It is the public policy of this State:

(A) Freedom from Unlawful Discrimination. To secure for all individuals within Illinois the freedom from discrimination against any individual because of his or her race, color, religion, sex, national origin, ancestry, age, marital status, physical or mental handicap, or unfavorable discharge from military service in connection with employment, real estate transactions, access to financial credit, and the availability of public accommodations.

(B) Freedom from Sexual Harassment – Employment and Higher Education. To prevent sexual harassment in employment and sexual harassment in higher education.

(C) Freedom from Discrimination Based on Citizenship Status – Employment. To prevent discrimination based on citizenship status in employment.

(D) Freedom from Discrimination Based on Familial Status – Real Estate Transactions. To prevent discrimination based on familial status in real estate transactions.

(E) Public Health, Welfare and Safety. To promote the public health, welfare and safety by protecting the interest of all people in Illinois in maintaining personal dignity, in realizing their full productive capacities, and in furthering their interests, rights and privileges as citizens of this State.

(F) Implementation of Constitutional Guarantees. To secure and guarantee the rights established by Sections 17, 18 and 19 of Article I of the Illinois Constitution of 1970.

(G) Equal Opportunity, Affirmative Action. To establish Equal Opportunity and Affirmative Action as the policies of this State in all of its decisions, programs and activities, and to assure that all State departments, boards, commissions and instrumentalities rigorously take affirmative action to provide equality of opportunity and eliminate the effects of past discrimination in the internal affairs of State government and in their relations with the public.

(H) Unfounded Charges. To protect citizens of this State against unfounded charges of unlawful discrimination, sexual harassment in employment and sexual harassment in higher education, and discrimination based on citizenship status in employment.

775 ILCS 5/1 – 103

5/1-103. General definitions

§ 1-103. General Definitions. When used in this Act, unless the context requires otherwise, the term:

(A) **Age.** "Age" means the chronological age of a person who is at least 40 years old, except with regard to any practice described in Section 2-102, insofar as that practice concerns training or apprenticeship programs. In the case of training or apprenticeship programs, for the purposes of Section 2-102, "age" means the chronological age of a person who is 18 but not yet 40 years old.

(B) **Aggrieved Party.** "Aggrieved party" means a person who is alleged or proved to have been injured by a civil rights violation or believes he or she will be injured by a civil rights violation under Article 3 that is about to occur.

(C) **Charge.** "Charge" means an allegation filed with the Department by an aggrieved party or initiated by the Department under its authority.

(D) **Civil Rights Violation.** "Civil rights violation" includes and shall be limited to only those specific acts set forth in Sections 2-102, 2-103, 2-105, 3-102, 3-103, 3-104, 3-104.1, 3-105, 4-102, 4-103, 5-102, 5A-102 and 6-101 of this Act.

(E) **Commission.** "Commission" means the Human Rights Commission created by this Act.

(F) **Complaint.** "Complaint" means the formal pleading filed by the Department with the Commission

following an investigation and finding of substantial evidence of a civil rights violation.

(G) Complainant. "Complainant" means a person including the Department who files a charge of civil rights violation with the Department or the Commission.

(H) Department. "Department" means the Department of Human Rights created by this Act.

(I) Handicap. "Handicap" means a determinable physical or mental characteristic of a person, including, but not limited to, a determinable physical characteristic which necessitates the person's use of a guide, hearing or support dog, the history of such characteristic, or the perception of such characteristic by the person complained against, which may result from disease, injury, congenital condition of birth or functional disorder and which characteristic:

(1) For purposes of Article 2 is unrelated to the person's ability to perform the duties of a particular job or position;

(2) For purposes of Article 3, is unrelated to the person's ability to acquire, rent or maintain a housing accommodation;

(3) For purposes of Article 4, is unrelated to a person's ability to repay;

(4) For purposes of Article 5, is unrelated to a person's ability to utilize and benefit from a place of public accommodation.

(J) Marital Status. "Marital status" means the legal status of being married, single, separated, divorced or widowed.

(K) National Origin. "National origin" means the place in which a person or one of his or her ancestors was born.

(L) Person. "Person" includes one or more individuals, partnerships, associations or organizations, labor organizations, labor unions, joint apprenticeship committees, or union labor associations, corporations, the State of Illinois and its instrumentalities, political subdivisions, units of local government, legal representatives, trustees in bankruptcy or receivers.

(M) Public Contract. "Public contract" includes every contract to which the State, any of its political subdivisions or any municipal corporation is a party.

(N) Religion. "Religion" includes all aspects of religious observance and practice, as well as belief, except that with respect to employers, for the purposes of Article 2, "religion" has the meaning ascribed to it in paragraph (F) of Section 2-101.

(O) Sex. "Sex" means the status of being male or female.

(P) Unfavorable Military Discharge. "Unfavorable military discharge" includes discharges from the Armed Forces of the United States, their Reserve components or any National Guard or Naval Militia which are classified as RE-3 or the equivalent thereof, but does not include those characterized as RE-4 or "Dishonorable".

(Q) Unlawful Discrimination. "Unlawful discrimination" means discrimination against a person because of his or her race, color, religion, national origin, ancestry, age, sex, marital status, handicap or unfavorable discharge from military service as those terms are defined in this Section.

ARTICLE 2. EMPLOYMENT
775 ILCS 5/2-101 (2000)

5/2-101. Definitions

§ 2-101. Definitions. The following definitions are applicable strictly in the context of this Article.

(A) Employee.

(1) "Employee" includes:

(a) Any individual performing services for remuneration within this State for an employer;

(b) An apprentice;

(c) An applicant for any apprenticeship.

(2) "Employee" does not include:

(a) Domestic servants in private homes;

(b) Individuals employed by persons who are not "employers" as defined by this Act;

(c) Elected public officials or the members of their immediate personal staffs;

(d) Principal administrative officers of the State or of any political subdivision, municipal corporation or other governmental unit or agency;

(e) A person in a vocational rehabilitation facility certified under federal law who has been designated an evaluee, trainee, or work activity client.

(B) Employer.

(1) "Employer" includes:

(a) Any person employing 15 or more employees within Illinois during 20 or more calendar weeks within the calendar year of or preceding the alleged violation;

(b) Any person employing one or more employees when a complainant alleges civil fights violation due to unlawful discrimination based upon his or her physical or mental handicap unrelated to ability or sexual harassment;

(c) The State and any political subdivision, municipal corporation or other government unit or agency, without regard to the number of employees;

(d) Any party to a public contract without regard to the number of employees;

(e) A joint apprenticeship or training committee without regard to the number of employees.

(2) "Employer" does not include any religious corporation, association, educational institution, society, or non-profit nursing institution conducted by and for those who rely upon treatment by prayer through spiritual means in accordance with the tenets of a recognized church or religious denomination with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association,

educational institution, society or non-profit nursing institution of its activities.

(C) Employment Agency. "Employment Agency" includes both public and private employment agencies and any person, labor organization, or labor union having a hiring hall or hiring office regularly undertaking, with or without compensation, to procure opportunities to work, or to procure, recruit, refer or place employees.

(D) Labor Organization. "Labor Organization" includes any organization, labor union, craft union, or any voluntary unincorporated association designed to further the cause of the rights of union labor which is constituted for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment, or apprenticeships or applications for apprenticeships, or of other mutual aid or protection in connection with employment, including apprenticeships or applications for apprenticeships.

(E) Sexual Harassment. "Sexual harassment" means any unwelcome sexual advances or requests for sexual favors or any conduct of a sexual nature when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.

(F) Religion. "Religion" with respect to employers includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

(G) Public Employer. "Public employer" means the State, an agency or department thereof, unit of local government, school district, instrumentality or political subdivision.

(H) Public Employee. "Public employee" means an employee of the State, agency or department thereof, unit of local government, school district, instrumentality or political subdivision. "Public employee" does not include public officers or employees of the General Assembly or agencies thereof.

(I) Public Officer. "Public officer" means a person who is elected to office pursuant to the Constitution or a statute or ordinance, or who is appointed to an office which is established, and the qualifications and duties of which are prescribed, by the Constitution or a statute or ordinance, to discharge a public duty for the State, agency or department thereof, unit of local government, school district, instrumentality or political subdivision.

(J) Eligible Bidder. "Eligible bidder" means a person who, prior to a bid opening, has filed with the Department a properly completed, sworn and currently valid employer report form, pursuant to the Department's regulations. The provisions of this Article relating to eligible bidders apply only to bids on contracts with the State and

its departments, agencies, boards, and commissions, and the provisions do not apply to bids on contracts with units of local government or school districts.

(K) Citizenship Status. "Citizenship status" means the status of being:

(1) a born U.S. citizen;

(2) a naturalized U.S. citizen;

(3) a U.S. national; or

(4) a person born outside the United States and not a U.S. citizen who is not an unauthorized alien and who is protected from discrimination under the provisions of Section 1324b of Title 8 of the United States Code, as now or hereafter amended. [8 U.S.C. § 1324b]

775 ILCS 5/2-102

5/2-102. Civil rights violations-Employment

§ 2-102. Civil Rights Violations – Employment. It is a civil rights violation:

(A) Employers. For any employer to refuse to hire, to segregate, or to act with respect to recruitment, hiring, promotion, renewal of employment, selection for training or apprenticeship, discharge, discipline, tenure or terms, privileges or conditions of employment on the basis of unlawful discrimination or citizenship status.

(B) Employment Agency. For any employment agency to fail or refuse to classify properly, accept applications and register for employment referral or apprenticeship referral, refer for employment, or refer for

apprenticeship on the basis of unlawful discrimination or citizenship status or to accept from any person any job order, requisition or request for referral of applicants for employment or apprenticeship which makes or has the effect of making unlawful discrimination or discrimination on the basis of citizenship status a condition of referral.

(C) Labor Organization. For any labor organization to limit, segregate or classify its membership, or to limit employment opportunities, selection and training for apprenticeship in any trade or craft, or otherwise to take, or fail to take, any action which affects adversely any person's status as an employee or as an applicant for employment or as an apprentice, or as an applicant for apprenticeships, or wages, tenure, hours of employment or apprenticeship conditions on the basis of unlawful discrimination or citizenship status.

(D) Sexual Harassment. For any employer, employee, agent of any employer, employment agency or labor organization to engage in sexual harassment; provided, that an employer shall be responsible for sexual harassment of the employer's employees by non-employees or nonmanagerial and nonsupervisory employees only if the employer becomes aware of the conduct and fails to take reasonable corrective measures.

(E) Public Employers. For any public employer to refuse to permit a public employee under its jurisdiction who takes time off from work in order to practice his or her religious beliefs to engage in work, during hours other than such employee's regular working hours, consistent with the operational needs of the employer and in

order to compensate for work time lost for such religious reasons. Any employee who elects such deferred work shall be compensated at the wage rate which he or she would have earned during the originally scheduled work period. The employer may require that an employee who plans to take time off from work in order to practice his or her religious beliefs provide the employer with a notice of his or her intention to be absent from work not exceeding 5 days prior to the date of absence.

(F) Training and Apprenticeship Programs. For any employer, employment agency or labor organization to discriminate against a person on the basis of age in the selection, referral for or conduct of apprenticeship or training programs.

(G) Immigration-Related Practices. For an employer to request for purposes of satisfying the requirements of Section 1324a(b) of Title 8 of the United States Code, as now or hereafter amended, more or different documents than are required under such Section or to refuse to honor documents tendered that on their face reasonably appear to be genuine.

It is not a civil rights violation for an employer to take any action that is required by Section 1324a of Title 8 of the United States Code, as now or hereafter amended.

775 ILCS 5/2-103

5/2-103. Arrest record

§ 2-103. Arrest Record. (A) Unless otherwise authorized by law, it is a civil rights violation for any employer, employment agency or labor organization to inquire into

or to use the fact of an arrest or criminal history record ordered expunged, sealed or impounded under Section 5 of the Criminal Identification Act [20 ILCS 2630/5] as a basis to refuse to hire, to segregate, or to act with respect to recruitment, hiring, promotion, renewal of employment, selection for training or apprenticeship, discharge, discipline, tenure or terms, privileges or conditions of employment. This Section does not prohibit a State agency, unit of local government or school district, or private organization from utilizing conviction information obtained from the Department of State Police under the provisions of Section 3 of the Criminal Identification Act [20 ILCS 2630/3] in evaluating the qualifications and character of an employee or a prospective employee.

(B) The prohibition against the use of the fact of an arrest contained in this Section shall not be construed to prohibit an employer, employment agency, or labor organization from obtaining or using other information which indicates that a person actually engaged in the conduct for which he or she was arrested.

775 ILCS 5/2-104

5/2-104. Exemptions

§ 2-104. Exemptions.

(A) Nothing contained in this Act shall prohibit an employer, employment agency or labor organization from:

(1) *Bona Fide Qualification.* Hiring or selecting between persons for bona fide occupational

qualifications or any reason except those civil-rights violations specifically identified in this Article.

(2) *Veterans.* Giving preferential treatment to veterans and their relatives as required by the laws or regulations of the United States or this State or a unit of local government.

(3) *Unfavorable Discharge From Military Service.* Using unfavorable discharge from military service as a valid employment criterion when authorized by federal law or regulation or when a position of employment involves the exercise of fiduciary responsibilities as defined by rules and regulations which the Department shall adopt.

(4) *Ability Tests.* Giving or acting upon the results of any professionally developed ability test provided that such test, its administration, or action upon the results, is not used as a subterfuge for or does not have the effect of unlawful discrimination.

(5) *Merit and Retirement Systems.*

(a) Applying different standards of compensation, or different terms, conditions or privileges of employment pursuant to a merit or retirement system provided that such system or its administration is not used as a subterfuge for or does not have the effect of unlawful discrimination.

(b) Effecting compulsory retirement of any employee who has attained 65 years of age and who, for the 2-year period immediately preceding retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans of

the employer of such employee, which equals, in the aggregate, at least $44,000. If any such retirement benefit is in a form other than a straight life annuity (with no ancillary benefits) or if the employees contribute to any such plan or make rollover contributions, the retirement benefit shall be adjusted in accordance with regulations prescribed by the Department, so that the benefit is the equivalent of a straight life annuity (with no ancillary benefits) under a plan to which employees do not contribute and under which no rollover contributions are made.

(c) Until January 1, 1994, effecting compulsory retirement of any employee who has attained 70 years of age, and who is serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure) at an institution of higher education as defined by Section 1201 (a) of the Higher Education Act of 1965. [20 U.S.C. § 1141]

(6) *Training and Apprenticeship Programs.* Establishing an educational requirement as a prerequisite to selection for a training or apprenticeship program, provided such requirement does not operate to discriminate on the basis of any prohibited classification except age.

(7) *Police and Firefighter/Paramedic Retirement.* Imposing a mandatory retirement age for firefighters/paramedics or law enforcement officers and discharging or retiring such individuals pursuant to the mandatory retirement age if such action is taken pursuant to a bona fide retirement plan provided that the law enforcement officer or firefighter/paramedic has attained:

(a) the age of retirement in effect under applicable State or local law on March 3, 1983; or

(b) if the applicable State or local law was enacted after the date of enactment of the federal Age Discrimination in Employment Act Amendments of 1996 (P.L. 104-208), the age of retirement in effect on the date of such discharge under such law.

This paragraph (7) shall not apply with respect to any cause of action arising under the Illinois Human Rights Act as in effect prior to the effective date of this amendatory Act of 1997.

(8) *Police and Firefighter/Paramedic Appointment.* Failing or refusing to hire any individual because of such individual's age if such action is taken with respect to the employment of an individual as a firefighter/paramedic or as a law enforcement officer and the individual has attained:

(a) the age of hiring or appointment in effect under applicable State or local law on March 3, 1983; or

(b) the age of hiring in effect on the date of such failure or refusal to hire under applicable State or local law enacted after the date of enactment of the federal Age Discrimination in Employment Act Amendments of 1996 (P.L. 104-208).

As used in paragraph (7) or (8):

"Firefighter/paramedic" means an employee, the duties of whose position are primarily to perform work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment, or to provide

emergency medical services, including an employee engaged in this activity who is transferred to a supervisory or administrative position.

"Law enforcement officer" means an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of criminal offenses, including an employee engaged in this activity who is transferred to a supervisory or administrative position.

(9) *Citizenship Status.* Making legitimate distinctions based on citizenship status if specifically authorized or required by State or federal law.

(B) With respect to any employee who is subject to a collective bargaining agreement:

(a) which is in effect on June 30, 1986,

(b) which terminates after January 1, 1987,

(c) any provision of which was entered into by a labor organization as defined by Section 6(d) (4) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)(4)), and

(d) which contains any provision that would be superseded by this amendatory Act of 1987 (Public Act 85-748),

such amendatory Act of 1987 shall not apply until the termination of such collective bargaining agreement or January 1, 1990, whichever occurs first.

(C)(1) For purposes of this Act, the term "handicap" shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when an employer acts on the basis of such use.

(2) Paragraph (1) shall not apply where an employee or applicant for employment:

(a) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(b) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(c) is erroneously regarded as engaging in such use, but is not engaging in such use.

It shall not be a violation of this Act for an employer to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in subparagraph (a) or (b) is no longer engaging in the illegal use of drugs.

(3) An employer:

(a) may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;

(b) may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;

(c) may require that employees behave in conformance with the requirements established under the federal Drug-Free Workplace Act of 1988 (11 U.S.C. 701 et seq.) and the Drug Free Workplace Act [30 ILCS 580/1 et seq.];

(d) may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such employer holds other

employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employees; and

(e) may, with respect to federal regulations regarding alcohol and the illegal use of drugs, require that:

(i) employees comply with the standards established in such regulations of the United States Department of Defense, if the employees of the employer are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the employer who are employed in such positions (as defined in the regulations of the Department of Defense);

(ii) employees comply with the standards established in such regulations of the Nuclear Regulatory Commission, if the employees of the employer are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the employer who are employed in such positions (as defined in the regulations of the Nuclear Regulatory Commission); and

(iii) employees comply with the standards established in such regulations of the United States Department of Transportation, if the employees of the employer are employed in a transportation industry subject to such regulations, including complying with such regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the employer who are employed in such positions (as defined in the regulations of the United States Department of Transportation).

(4) For purposes of this Act, a test to determine the illegal use of drugs shall not be considered a medical examination. Nothing in this Act shall be construed to encourage, prohibit, or authorize the conducting of drug testing for the illegal use of drugs by job applicants or employees or making employment decisions based on such test results.

(5) Nothing in this Act shall be construed to encourage, prohibit, restrict, or authorize the otherwise lawful exercise by an employer subject to the jurisdiction of the United States Department of Transportation of authority to:

(a) test employees of such employer in, and applicants for, positions involving safety-sensitive duties for the illegal use of drugs and for on-duty impairment by alcohol; and

(b) remove such persons who test positive for illegal use of drugs and on-duty impairment by alcohol pursuant to subparagraph (a) from safety-sensitive duties in implementing paragraph (3).

775 ILCS 5/2-105

5/2-105. Equal employment opportunities – Affirmative action

§ 2-105. Equal Employment Opportunities; Affirmative Action.

(A) Public Contracts. Every party to a public contract and every eligible bidder shall:

(1) Refrain from unlawful discrimination and discrimination based on citizenship status in employment and undertake affirmative action to assure

equality of employment opportunity and eliminate the effects of past discrimination;

(2) Comply with the procedures and requirements of the Department's regulations concerning equal employment opportunities and affirmative action;

(3) Provide such information, with respect to its employees and applicants for employment, and assistance as the Department may reasonably request;

(4) Have written sexual harassment policies that shall include, at a minimum, the following information: (i) the illegality of sexual harassment; (ii) the definition of sexual harassment under State law; (iii) a description of sexual harassment, utilizing examples; (iv) the vendor's internal complaint process including penalties; (v) the legal recourse, investigative and complaint process available through the Department and the Commission; (vi) directions on how to contact the Department and Commission; and (vii) protection against retaliation as provided by Section 6-101 of this Act [775 ILCS 5/6-101]. A copy of the policies shall be provided to the Department upon request.

(B) State Agencies. Every State executive department, State agency, board, commission, and instrumentality shall:

(1) Comply with the procedures and requirements of the Department's regulations concerning equal employment opportunities and affirmative action;

(2) Provide such information and assistance as the Department may request.

(3) Establish, maintain, and carry out a continuing affirmative action plan consistent with this Act and the regulations of the Department designed to promote equal opportunity for all State residents in

every aspect of agency personnel policy and practice. For purposes of these affirmative action plans, the race and national origin categories to be included in the plans are: African American, Hispanic or Latino, Native American, Asian, and any other category as required by Department rule. This plan shall include a current detailed status report:

(a) indicating, by each position in State service, the number, percentage, and average salary of individuals employed by race, national origin, sex and disability, and any other category that the Department may require by rule;

(b) identifying all positions in which the percentage of the people employed by race, national origin, sex and disability, and any other category that the Department may require by rule, is less than four-fifths of the percentage of each of those components in the State work force;

(c) specifying the goals and methods for increasing the percentage by race, national origin, sex and disability, and any other category that the Department may require by rule, in State positions;

(d) indicating progress and problems toward meeting equal employment opportunity goals, including, if applicable, but not limited to, Department of Central Management Services recruitment efforts, publicity, promotions, and use of options designating positions by linguistic abilities;

(e) establishing a numerical hiring goal for the employment of qualified persons with disabilities in the agency as a whole, to be based

on the proportion of people with work disabilities in the Illinois labor force as reflected in the most recent decennial Census.

(4) If the agency has 1000 or more employees, appoint a full-time Equal Employment Opportunity officer, subject to the Department's approval, whose duties shall include:

(a) Advising the head of the particular State agency with respect to the preparation of equal employment opportunity programs, procedures, regulations, reports, and the agency's affirmative action plan.

(b) Evaluating in writing each fiscal year the sufficiency of the total agency program for equal employment opportunity and reporting thereon to the head of the agency with recommendations as to any improvement or correction in recruiting, hiring or promotion needed, including remedial or disciplinary action with respect to managerial or supervisory employees who have failed to cooperate fully or who are in violation of the program.

(c) Making changes in recruitment, training and promotion programs and in hiring and promotion procedures designed to eliminate discriminatory practices when authorized.

(d) Evaluating tests, employment policies, practices and qualifications and reporting to the head of the agency and to the Department any policies, practices and qualifications that have unequal impact by race, national origin as required by Department rule, sex or disability or any other category that the Department may require by rule, and to assist in the recruitment of people in underrepresented classifications.

This function shall be performed in cooperation with the State Department of Central Management Services.

(e) Making any aggrieved employee or applicant for employment aware of his or her remedies under this Act.

In any meeting, investigation, negotiation, conference, or other proceeding between a State employee and an Equal Employment Opportunity officer, a State employee (1) who is not covered by a collective bargaining agreement and (2) who is the complaining party or the subject of such proceeding may be accompanied, advised and represented by (1) an attorney licensed to practice law in the State of Illinois or (2) a representative of an employee organization whose membership is composed of employees of the State and of which the employee is a member. A representative of an employee, other than an attorney, may observe but may not actively participate, or advise the State employee during the course of such meeting, investigation, negotiation, conference or other proceeding. Nothing in this Section shall be construed to permit any person who is not licensed to practice law in Illinois to deliver any legal services or otherwise engage in any activities that would constitute the unauthorized practice of law. Any representative of an employee who is present with the consent of the employee, shall not, during or after termination of the relationship permitted by this Section with the State employee, use or reveal any information obtained during the course of the meeting, investigation, negotiation, conference or other proceeding without the consent of the complaining party and any State employee who is the subject of the proceeding and pursuant to rules and regulations

governing confidentiality of such information as promulgated by the appropriate State agency. Intentional or reckless disclosure of information in violation of these confidentiality requirements shall constitute a Class B misdemeanor.

(5) Establish, maintain and carry out a continuing sexual harassment program that shall include the following:

(a) Develop a written sexual harassment policy that includes at a minimum the following information: (i) the illegality of sexual harassment; (ii) the definition of sexual harassment under State law; (iii) a description of sexual harassment, utilizing examples; (iv) the agency's internal complaint process including penalties; (v) the legal recourse, investigative and complaint process available through the Department and the Commission; (vi) directions on how to contact the Department and Commission; and (vii) protection against retaliation as provided by Section 6-101 of this Act [775 ILCS 5/6-101]. The policy shall be reviewed annually.

(b) Post in a prominent and accessible location and distribute in a manner to assure notice to all agency employees without exception the agency's sexual harassment policy. Such documents may meet, but shall not exceed, the 6th grade literacy level. Distribution shall be effectuated within 90 days of the effective date of this amendatory Act of 1992 and shall occur annually thereafter.

(c) Provide training on sexual harassment prevention and the agency's sexual harassment policy as a component of all ongoing or new employee training programs.

(6) Notify the Department 30 days before effecting any layoff. Once notice is given, the following shall occur:

(a) No layoff may be effective earlier than 10 working days after notice to the Department, unless an emergency layoff situation exists.

(b) The State executive department, State agency, board, commission, or instrumentality in which the layoffs are to occur must notify each employee targeted for layoff, the employee's union representative (if applicable), and the State Dislocated Worker Unit at the Department of Commerce and Community Affairs.

(c) The State executive department, State agency, board, commission, or instrumentality in which the layoffs are to occur must conform to applicable collective bargaining agreements.

(d) The State executive department, State agency, board, commission, or instrumentality in which the layoffs are to occur should notify each employee targeted for layoff that transitional assistance may be available to him or her under the Economic Dislocation and Worker Adjustment Assistance Act [*29 USCS § 2101* et seq.] administered by the Department of Commerce and Community Affairs. Failure to give such notice shall not invalidate the layoff or postpone its effective date.

As used in this subsection (B), "disability" shall be defined in rules promulgated under the Illinois Administrative Procedure Act [5 ILCS 100/1-1 et seq.].

(C) Civil Rights Violations. It is a civil rights violation for any public contractor or eligible bidder to:

(1) fail to comply with the public contractor's or eligible bidder's duty to refrain from unlawful discrimination and discrimination based on citizenship status in employment under subsection (A)(1) of this Section; or

(2) fail to comply with the public contractor's or eligible bidder's duties of affirmative action under subsection (A) of this Section, provided however, that the Department has notified the public contractor or eligible bidder in writing by certified mail that the public contractor or eligible bidder may not be in compliance with affirmative action requirements of subsection (A). A minimum of 60 days to comply with the requirements shall be afforded to the public contractor or eligible bidder before the Department may issue formal notice of non-compliance.

No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

ILLINOIS STATE UNIVERSITY, *et al.*,

Petitioners,

v.

DR. IRIS I. VARNER, *et al.*,

Respondents,

AND

UNITED STATES OF AMERICA,

Intervenor-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

QUESTIONS PRESENTED

1. Does the Equal Pay Act abrogate Eleventh Amendment immunity?

2. Does Congress have the power under Section 5 of the Fourteenth Amendment to abrogate the Eleventh Amendment immunity of the States absent a showing of either constitutional violations or exceptional circumstances?

PARTIES TO THE PROCEEDING

The petitioners in this case are Illinois State University, Robert W. Jefferson, David Strand, John K. Urice, Thomas P. Wallace, The Board Of Regents, and David T. Murphy, Carol K. Burns, Joseph B. Ebbesen, Carl E. Kasten, Nancy J. Masterson, Patricia A. McKenzie, James W. Myles, Barbara Scheibling, Niranjan Shah and William Sulaski, individually and in their capacities as members of The Board of Regents. The respondents are Dr. Iris I. Varner, Dr. Teresa M. Palmer and Dr. Paula J. Pomerenke, on their own behalf and on behalf of all other persons similarly situated.

RULE 29.1 STATEMENT

Petitioner Illinois State University is governed by the Illinois State University Board of Trustees (formerly the Board of Regents), a body politic and corporate, which is a creation of statute and an arm of the State of Illinois. Petitioners Robert W. Jefferson, David Strand, John K. Urice, Thomas P. Wallace, David T. Murphy, Carol K. Burns, Joseph B. Ebbesen, Carl E. Kasten, Nancy J. Masterson, Patricia A. McKenzie, James W. Myles, Barbara Scheibling, Niranjan Shah and William Sulaski are individuals.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Illinois State University, *et al.* ("ISU") hereby petition this Court to issue a writ of certiorari for review of the ruling of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the circuit court is reported at 150 F.3d 706 (7th Cir. 1998). *See* Appendix ("App.") at 2a. The two opinions of the district court are reported at 972 F. Supp. 458 (C.D. Ill. 1997) and 986 F. Supp. 1107 (C.D. Ill. 1996), respectively. *See id.* at 27a and 47a. The Magistrate's Report and Recommendation is not reported. *See id.* at 39a. The October 13, 1998 Order of the Court of Appeals denying ISU's request for rehearing and suggestion for rehearing *en banc* is also not reported. *See id.* at la.

JURISDICTION

The ruling of the Court of Appeals was entered on July 21, 1998. *See* App. at 2a. On October 13, 1998, the Seventh Circuit denied ISU's request for rehearing and suggestion for rehearing *en banc*. *See id.* at la. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution provides as follows:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONST. amend. XI.

The Fourteenth Amendment to the United States Constitution provides in pertinent part as follows:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> . . . .
>
> SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. CONST. amend. XIV, §§ 1, 5.

The forum selection clause of the Equal Pay Act, 29 U.S.C. § 206(d)(1), which is itself derived from the Fair Labor Standards Act, 29 U.S.C. §§ 201-216, provides in pertinent part as follows:

> An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public

> agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.

29 U.S.C. § 216(b). The Equal Pay Act and the relevant portions of the Fair Labor Standards Act are reprinted in their entirety in the Appendix.

STATEMENT OF THE CASE

The proceedings in the district court and the circuit court are discussed below.

A. Proceedings In The District Court

On their own behalf and on behalf of all other persons similarly situated, Plaintiffs Dr. Iris I. Varner, *et al.* (collectively referred to herein as "Plaintiffs") filed this suit on March 13, 1995 against ISU and various of its officers and regents, alleging violations of the Equal Pay Act and seeking from ISU money damages as well as injunctive relief. On May 22, 1997, the district court certified a class that consists of all female faculty members at ISU from 1982 to the present.

Following this Court's decision in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), ISU moved on October 22, 1996 to dismiss Plaintiffs' Equal Pay Act claims on Eleventh Amendment grounds. On July 11, 1997, the United States Department of Justice ("DOJ") sought leave to intervene in the proceeding before the district court. On July 30, 1997 (after granting the DOJ's motion to intervene but before allowing ISU an opportunity to respond to the

DOJ's submission), the district court denied ISU's motion to dismiss. *See* App. at 27a. On August 28, 1997, ISU filed a notice of appeal.

B. Proceedings In The Circuit Court

Oral argument was held by the circuit court on February 26, 1998, and on July 21, 1998, the circuit court issued its panel opinion. *See* App. at 2a. In affirming the district court, the Seventh Circuit began by reiterating the principals [sic] established by this Court in *Seminole Tribe—i.e.*, the States are immune from suit in federal court unless Congress (i) unequivocally expresses its intent to abrogate immunity in the text of the statute itself and then only if (ii) Congress has properly acted pursuant to its authority under Section 5 of the Fourteenth Amendment. *See id.* at 4a.

Although the circuit court acknowledged the principals [sic] of *Seminole Tribe*, it by no means adhered to them. In spite of this Court's requirement that evidence of intent to abrogate be found in the statute itself, the circuit court devoted much of its opinion to a discussion of the "context and history" of the Equal Pay Act, concluding that matters outside the statutory text were "helpful" in determining whether Congress intended to abrogate. *See* App. at 6a. To that end, the Seventh Circuit found that the 1974 Amendments to the Fair Labor Standards Act (and by extension the Equal Pay Act) were intended as a "response" to this Court's decision in *Employees v. Department of Public Health & Welfare*, 411

U.S. 279, 284-86 (1973).[1] Based on that interpretation of the events surrounding the passage of the 1974 amendments, the circuit court found evidence of intent to abrogate. *See id.* at 6a-8a.

The circuit court next looked at the statute itself. *See* App. at 8a. The circuit court, however, rested its entire textual analysis on the fact that the 1974 amendments to the Fair Labor Standards Act (i) defined "employees" to include both federal and state employees and (ii) allowed those individuals to file suit against their "employers" in "any Federal or State court of *competent jurisdiction*." *See id.* (emphasis added). While the circuit court acknowledged in passing this Court's prior ruling that "general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment," the circuit court nonetheless concluded under its own precedents that any further "degree of explicitness is not required," never considering how a federal court is a "court of competent jurisdiction" in those instances where a State is a party. *See id.* at 9a (citing *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246 (1985)). The circuit court likewise acknowledged this Court's prior holding that even the creation of a cause of action against a State is insufficient evidence of intent to abrogate, but again, the circuit court took another path. *See id.* at 8a-9a (citing *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197 (1991)). Accordingly, the circuit

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[1] The Equal Pay Act was enacted in 1963 as an amendment to the Fair Labor Standards Act. Both pieces of legislation share definitions and enforcement provisions. *See* 29 U.S.C. §§ 201-216.

court found that the first prong of the *Seminole Tribe* test was met.

The circuit court also found that the second prong of the *Seminole Tribe* test had been satisfied, ruling that Congress had the power under the Fourteenth Amendment to prohibit what amounts to constitutional state action. *See* App. at 10a-23a. More specifically, the circuit court rejected ISU's argument that because liability attaches under the Equal Pay Act without any showing of intentional discrimination, the Equal Pay Act proscribes constitutional state action and is, therefore, not proper "remedial" legislation under the Fourteenth Amendment. *See id.* at 19a-23a.

The circuit court began its analysis by noting that this Court had rejected in *Boerne* any notion that Congress has "substantive" legislative powers under the Fourteenth Amendment. *See* App. at 19a-20a (citing *City of Boerne v. Flores*, — U.S. —, 117 S. Ct. 2157, 2163-64 (1997)). The circuit further acknowledged that ISU's reading of *Boerne* was not "without some appeal." *See id.* at 20a. The circuit court, however, had considerable difficulty distinguishing between "substantive" and "remedial" legislation, concluding that a lack of uniformity in the way the terms were applied had led to a disarray in the various courts of appeals:

> The Supreme Court's distinction between substantive and remedial legislation has not been applied uniformly in the courts of appeals. In the context of Eleventh Amendment challenges to antidiscrimination statutes, the distinction has resulted in disarray.

Id. at 20a n.12.

In spite of the disarray, the circuit court ultimately ruled that since the Equal Pay Act was intended to remedy the "serious and endemic problem of employment discrimination in *private industry*," the statute is not "out of proportion to the harms that Congress sought to redress." *See* App. at 21a-22a (emphasis added). Accordingly, the circuit court attempted to meet the requirements of *Boerne* by relying on a congressional finding of discrimination in *private industry* in order to justify the abrogation of the Eleventh Amendment immunity of the States. *See id.* at 21a. No further explanation was given by the circuit court as to why a finding about private industry should have any bearing at all on whether the States had violated the Fourteenth Amendment, let alone serve as a basis for abrogation of Eleventh Amendment immunity.

In light of the foregoing, ISU filed with the circuit court a request for rehearing and a suggestion for rehearing *en banc*.[2] *See* App. at la. ISU's request for rehearing was denied by the circuit court without opinion on October 13, 1998. *See id.*

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[2] While ISU's petition for rehearing was pending, the Eighth Circuit reached the opposite conclusion the Seventh Circuit had reached in this case. *Compare Humenansky v. Regents of the Univ. of Minnesota*, 152 F.3d 822 (8th Cir. 1998) *with* App. 2a-26a. The Eighth Circuit ruled in *Humenansky* that Congress had exceeded its Section 5 power in passing the Age Discrimination in Employment Act. *See Humenansky*, 152 F.3d at 828. The *Humenansky* decision was promptly brought to the attention of the Seventh Circuit. Hence, the "disarray" noted by the circuit court in its opinion in this case has only grown deeper since that opinion was issued.

ISU now requests that this Court issue a writ of certiorari in order to review the decision of the circuit court.

REASONS FOR GRANTING THE WRIT

In recent years, this Court has given clear directives to the circuit courts on the proper analysis of Eleventh Amendment immunity. By and large, those directives are not being followed. This is most certainly a case in point. Here, the circuit court acted in direct conflict with this Court's prior rulings on at least two different issues.

First, the circuit court's analysis of congressional intent to abrogate was based largely on an impermissible analysis of legislative history and statutory context. The only textual analysis performed by the circuit revealed no evidence of intent, and the circuit did not even consider the fact that Congress itself expressly limited suits under the Equal Pay Act to courts of "competent jurisdiction." In fact, the circuit court's reading of the Equal Pay Act was so cursory and illogical that it would have the unintended consequence of subjecting the federal government to suit in state court on *any* claim made under the Fair Labor Standards Act, a result that not even the circuit could believe was intended by Congress. Accordingly, the circuit court acted in a manner that is directly at odds with this Court's rulings in *Atascadero* and *Dellmuth*.

Second, the circuit court failed to follow this Court's rulings in *Boerne* and *Katzenbach*. The circuit court found that under the Fourteenth Amendment, Congress has the authority to abrogate the Eleventh Amendment immunity of the States based on nothing more than a finding of

employment discrimination in *private industry*. That finding can, of course, not possibly serve as a basis under the Fourteenth Amendment for abrogating Eleventh Amendment immunity. Even worse, the circuit court never addressed the forum selection clause of the Equal Pay Act nor did it so much as consider how allowing States to be sued in federal court could conceivably meet the "congruence and proportionality" test of *Boerne*. Thus, the circuit court came to the opposite result required by *Boerne* and *Katzenbach*, and in so doing, it denied the State of Illinois the right to Eleventh Amendment immunity to which it is entitled under the Constitution.

We elaborate below.

I. THE CIRCUIT COURT'S DECISION DIRECTLY CONFLICTS WITH THIS COURT'S PRECEDENTS ON THE DISPOSITIVE ISSUE OF CONGRESSIONAL INTENT

As noted above (*see* disc. *supra* at 3), this Court established a two-prong test for abrogation in *Seminole Tribe*. *See Seminole Tribe*, 517 U.S. at 55. Under the first prong of that test, abrogation can be found if and only if Congress has expressed in the statute itself an "unmistakably clear" expression of intent to abrogate. *See id.* at 55-56. The circuit court, however, failed to find the required expression of intent. In so doing, the circuit court acted in a manner that is directly at odds with this Court's precedents, thereby denying ISU of its right to Eleventh Amendment immunity. Moreover, the circuit court set a precedent that will now allow the federal government to be sued in state court for any violation of

the Fair Labor Standards Act, thereby opening the floodgates for scores of suits to be brought against the United States in the courts of the States.

A. Clear And Unambiguous Evidence Of Intent To Abrogate Must Be Found In The Statute Itself

This Court has repeatedly held that in order to abrogate Eleventh Amendment immunity, congressional intent must be "unmistakably clear in the language of the statute." *See, e.g., Dellmuth v. Muth*, 491 U.S. 223, 228 (1989). Such evidence must be both "textual" and "unequivocal." *See id.* at 230; *see also Atascadero*, 473 U.S. at 243. If the text of the statute does not make it absolutely clear that Congress intended to abrogate, then the abrogation inquiry stops there. *See id.* Any ambiguity compels a finding of no abrogation. *See, e.g., United States v. Nordic Village, Inc.*, 503 U.S. 30, 37 (1992); *see also Kimel v. State of Florida Bd. of Regents*, 139 F.3d 1426, 1431 (11th Cir. 1998) (language supporting abrogation must be "clear as the summer sun").

Because evidence of intent must be found in the statute itself, recourse to materials outside the statute is neither necessary nor appropriate. *See, e.g., Dellmuth*, 491 U.S. at 230. As this Court has held on numerous occasions, analysis of legislative history plays no role whatsoever in the required analysis. *See, e.g., id.* Similarly, review of the statutory "structure" is of no relevance. *See, e.g., id.* If the statute itself does not reflect "clear" and "unambiguous" evidence of intent, then nothing in the legislative history or the structure of the statute is of any

consequence. *See, e.g., id.; see also Nordic Village*, 503 U.S. at 37.

B. The Only Textual Basis Identified By The Circuit Court Has Long Since Been Rejected By This Court As A Basis For Abrogation

The circuit court was able to identify little or no textual support for abrogation. *See* App. at 7a-9a. It was for that reason that the circuit court was forced to rely on the legislative history and the statutory structure of the Equal Pay Act. *See* disc. *infra* at 15-16. Misplaced as it was, however, that reliance does not and cannot obscure the lack of any clear evidence of intent to abrogate in the Equal Pay Act itself.

Unlike a number of federal statutes that explicitly abrogate Eleventh Amendment immunity, the Equal Pay Act does not even mention the Eleventh Amendment, sovereign immunity or abrogation. *Compare* Equal Pay Act, 29 U.S.C. § 216(b), *with, e.g.*, Copyright Act, 17 U.S.C. § 511 (a) *and* Age Discrimination in Employment Act, 42 U.S.C. § 12202; *see also, e.g., Kimel*, 139 F.3d at 1430-31 (giving weight to the fact that the Age Discrimination in Employment Act contains "no reference to the Eleventh Amendment or to states' sovereign immunity"). Quite to the contrary, the Equal Pay Act is entirely silent on the issue, placing it in sharp contrast to the statutes that contain the necessary expression of intent. *See, e.g.*, 42 U.S.C. § 12202 ("A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter.").

Given the absence of any direct textual evidence of intent to abrogate, the circuit court relied instead upon language in the Equal Pay Act that "authorizes 'employees' to sue 'public agencies' " in any "Federal or State court of *competent jurisdiction*." *See* App. at 8a (emphasis added). This clause was the sum total of the "evidence" found by the circuit for intent to abrogate. *See id.* Under this Court's precedents, however, that clause scarcely constitutes "unmistakably clear" evidence of intent.

1. In Limiting Suits To Courts Of "Competent Jurisdiction," Congress Provided No Evidence Of Intent To Abrogate Eleventh Amendment Immunity

On its face, the clause relied upon by the circuit court simply does not amount to an unambiguous expression of intent. Congress only authorized suit in courts of "competent jurisdiction." *See* 29 U.S.C. § 216(b). In light of the Eleventh Amendment, however, a federal court is plainly not a court of "competent jurisdiction" for a suit brought against a State. *See United States v. Morton*, 467 U.S. 822, 828 (1984) (the term "competent jurisdiction" generally refers to subject matter jurisdiction); *see also Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984) (Eleventh Amendment is a jurisdictional limit on the federal courts); *Atascadero*, 473 U.S. at 243 (same).

Significantly, the circuit court did not consider the meaning of the phrase "competent jurisdiction." *See* App. at 6a-9a. That phrase, however, must be accounted for in any meaningful assessment of congressional intent. *See*,

e.g., Walters v. Metropolitan Educ. Enter., Inc., — U.S. —, 117 S. Ct. 600, 664 (1997) (statutes must be interpreted to give each word effect). By including the phrase "court of competent jurisdiction," Congress was by no means signaling an "unequivocal" intent to upset the general rule (as reflected in the Eleventh Amendment) that the States are not subject to suit in federal court. *See, e.g., Atascadero*, 473 U.S. at 242-43. If anything, Congress was doing just the opposite. *See, e.g., Kimel*, 139 F.3d at 1432 n. 11 (" [A] federal court lacks 'competent jurisdiction' if the Eleventh Amendment prohibits the suits against the State."). The inclusion of the phrase in the statute is a fairly clear indication that the Eleventh Amendment was not being abrogated. *See, e.g., id.; see also, e.g., Employees*, 411 U.S. at 281. What else could it mean?

At most, the phrase "court of competent jurisdiction" makes the statute ambiguous as an indicator of congressional intent to abrogate. Under this Court's precedents, however, ambiguity compels the converse of the result reached by the circuit court. *See Atascadero*, 473 U.S. at 240 (abrogation only found when mandated "by the most express language or by [ ] overwhelming implication from the text"). If there is ambiguous evidence of intent to abrogate, then there is no abrogation. *See, e.g., Nordic Village*, 503 U.S. at 37 (congressional intent to abrogate must be "unambiguous"). That is the rule set down by this Court but ignored by the circuit court. *See, e.g., Atascadero*, 473 U.S. at 240.

2. The Statutory Language Relied Upon By The Circuit Court Is Nothing More Than A General Authorization For Suit Against The States

In truth, the statutory language relied upon by the circuit *court* amounts to nothing more than the creation by Congress of a right of action against the States. *See* 29 U.S.C. § 216(b); *see also Kimel*, 139 F.3d at 1432 n.11. This Court, however, has explicitly rejected the argument that the creation of a cause of action is adequate evidence of intent to abrogate. *See Hilton*, 502 U.S. at 206. In *Hilton*, the Court drew a clear distinction between (i) the creation of a cause of action against the States *and* (ii) the abrogation of the Eleventh Amendment immunity of the States. *See id.* at 205-06. The two inquiries are separate and distinct, and as reflected in *Hilton*, a cause of action can be created without any abrogation of Eleventh Amendment immunity.[3] *See id.*

There is obviously a fundamental difference between the issue of *where* a State may be sued and the issue of *whether* it may be sued. *See Hilton*, 502 U.S. at 205-06; *see also Welch*, 483 U.S. at 473. The circuit court, however, conflated the two.

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[3] In *Welch v. Texas Department of Highways and Public Transportation*, 483 U.S. 468, 476 (1987), this Court ruled that the Jones Act did *not* abrogate Eleventh Amendment immunity. The State of South Carolina then argued in *Hilton* that because there was no abrogation, there was necessarily no creation of a cause of action against the States. *See Hilton*, 502 U.S. at 203-04. This Court, however, rejected that argument, finding creation and abrogation to be separate and distinct. *Compare id.* at 206 *with* App. at 8a.

ISU has never contested the fact that the Equal Pay Act creates a cause of action against the States. Rather, the issue here is whether in light of the Eleventh Amendment, such a claim may be brought in federal court.[4] Contrary to the conclusion reached by the circuit court, the fact that Congress created a cause of action against the States is in no way dispositive. *See Hilton*, 502 U.S. at 206. That is the clear holding of *Hilton*. *See id.*

By disregarding the foregoing precedents, the circuit court deprived ISU of its constitutional right to Eleventh Amendment immunity. Congress did create a cause of action against ISU in amending the Equal Pay Act in 1974. That cause of action, however, can and should be brought in the courts of the State of Illinois, in deference to the vital interests implicated by the Eleventh Amendment. *See, e.g., Welch*, 483 U.S. at 473 (a "State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued").

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[4] It is now well settled that a state employee having a claim under the other provisions of the Fair Labor Standards Act must pursue that claim in state court and not federal court. *See, e.g., Aaron v. Kansas*, 115 F.3d 813, 816-18 (10th Cir. 1997); *see also* App. at 10a n.5 (listing cases). Since it is also part of the Fair Labor Standards Act, why should the Equal Pay Act be any different? Moreover, there certainly is nothing extraordinary about Congress creating a cause of action against the States that is enforceable only in state court. *See, e.g., id.* Claims against the States under the Fair Labor Standards Act are pursued every day in state courts throughout the country, and no one is any worse for the wear. *See, e.g., Aaron*, at 817-18.

C. The Circuit Court's Interpretation Of The Equal Pay Act Would Lead To Incongruous Results

The serious infirmities in the textual analysis performed by the circuit court are made all the more clear by the obvious consequences of its reading of the Equal Pay Act. Under that reading, Congress would not only have abrogated Eleventh Amendment immunity, but it would have also allowed claims against the *federal* government to be brought in *state* courts.[5]

The circuit court concluded that because the Equal Pay Act authorizes suits by "employees" against "public agencies" in "any Federal or State court of competent jurisdiction," there is "little difficulty" in finding that Congress intended to abrogate.

See App. at 8a (emphasis omitted). The Equal Pay Act's definition of "employees," however, also includes employees of the federal government, and the statutory definition of "public agencies" likewise includes the federal government. *See* 29 U.S.C. § 203(e)(2)(A); 29 U.S.C. § 203(x). This is made very clear by the statute itself:

> "Public agency" means the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Rate Commission), a State, or a political subdivision of a State; or any interstate governmental agency.

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[5] Relevant portions of the Fair Labor Standards Act are reprinted in the Appendix at 57a-60a.

29 U.S.C. § 203(x). Thus, the Equal Pay Act treats federal and state governments identically. It creates for employees of both a cause of action against their employer in "any Federal or *State court* of competent jurisdiction." *See* 29 U.S.C. § 216(b) (emphasis added).

If Congress really intended to abrogate Eleventh Amendment immunity in the Equal Pay Act, then it necessarily follows that Congress also intended to waive the federal government's immunity to suit in state court by providing that suits against the federal government may be brought in either "Federal or State court."[6] *See* 29 U.S.C. § 216(b). After all, the standard for abrogation of the federal government's immunity is identical to the standard for abrogation of the Eleventh Amendment. *See King*, 395 U.S. at 3. There must be an "unequivocal" expression of intent to abrogate for both. *See, e.g., id.*

It could scarcely be suggested that the Equal Pay Act "plainly" eliminates the federal government's immunity

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[6] The full text of the forum selection clause in the Equal Pay Act is as follows:

> An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.

29 U.S.C. § 216(b). Given this language, it is obvious that the circuit court's reading of the Equal Pay Act necessarily means that the federal government can be sued in state court. *See id.; see also United States v. King*, 395 U.S. 1, 4 (1969) (identical standard for abrogation of state and federal immunity).

to suit in state court.[7] Yet there is absolutely no more textual evidence that Congress intended to eliminate the Eleventh Amendment immunity of the States. On the circuit court's reading of the statute, both conclusions are as inescapable as they are illogical.

If not corrected, the holding of the circuit court would have widespread implications. The federal government would be amenable to suit in state court not only under the Equal Pay Act but also under the many other provisions of the Fair Labor Standards Act, including its wage and overtime provisions. *See* App. at 57a-60a. Hundreds of cases against the federal government that are now litigated in federal court will be able to be litigated in state court, with the incongruous result that the federal government will have to defend itself in the courts of another sovereign.

In reality, of course, the Equal Pay Act clearly does not contain "unequivocal textual" evidence that Congress intended to abrogate the immunity of *either* the States or the federal government. Quite the opposite, it merely creates a right of action against both federal and state governments, without suggesting any intent to eliminate the traditional defenses afforded sovereigns for suits brought in the courts of another sovereign. *See* 29 U.S.C.

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[7] At oral argument before the circuit court, counsel for the United States (as intervenor) advanced the argument on intent that was ultimately accepted by the circuit court, but the United States was by no means willing to concede that the Equal Pay Act allows federal employees to sue the federal government in state court. No other result, however, can square with the circuit court's reading of the statute.

§ 216(b); *see also Dellmuth*, 491 U.S. at 229-30; *Hilton*, 502 U.S. at 206. The reasoning relied upon by the circuit court simply cannot support a finding of abrogation of either of Eleventh Amendment immunity or the sovereign immunity of the United States. *See, e.g., Dellmuth*, 491 U.S. at 230-32; *see also King*, 395 U.S. at 4.

Interpretations of statutes that lead to illogical or absurd results are to be avoided. *See, e.g., Clinton v. City of New York*, — U.S. —, 118 S. Ct. 2091, 2098 (1998). The circuit court, however, provided nothing more.

D. By Relying Upon Matters Outside The Text Of The Statute, The Circuit Court's Decision Conflicts With This Court's Prior Precedents

The circuit court was able to find no dispositive textual support for abrogation. *See* App. at 6a-9a. It was for that reason that it devoted so much of its opinion to a discussion of the legislative history and structure of the Equal Pay Act. *See id.* at 6a-8a.

Indeed, the circuit court made no bones about the nature of its inquiry. In the very first sentence of its discussion of congressional intent, the circuit court made the following statement:

> In deciding whether Congress unequivocally expressed its intent to abrogate the States' Eleventh Amendment immunity under the Equal Pay Act, *it is helpful to consider the context and history of the statute.*

App. at 6a (emphasis added). The circuit court then proceeded to identify the 1974 amendments to the Fair Labor Standards Act (and by incorporation the Equal Pay Act)

as a "response" to this Court's decision in *Employees*. *See id.* at 7a (citing *Employees*, 411 U.S. at 284-86).

The circuit court's conclusion can, of course, only be derived from a review of materials outside the statute, and by the Seventh Circuit's own admission, that analysis played a pivotal role in its conclusion that Congress intended the 1974 Amendments to abrogate Eleventh Amendment immunity.[8] *See* App. at 6a-7a.

As such, the opinion of the circuit court rests on an impermissible basis and is at odds with the precedents of this Court. By this Court's clear directives, the circuit court's analysis of context and history has no role whatsoever in a proper analysis. *See, e.g., Dellmuth*, 491 U.S. at 230; *see also Nordic Village*, 503 U.S. at 1016. The circuit court was only compelled to look at the legislative history and context because the required textual support was lacking. *See* App. at 6a-9a; *see also Dellmuth*, 491 U.S. at 230 (if it is necessary to resort to legislative history, then by definition the text of the statute is insufficiently clear to support abrogation).

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[8] Later in its opinion, the circuit court did suggest in a footnote that its lengthy analysis of legislative history played no role in its assessment of intent. *See* App. at 7a n4. That disclaimer, however, is directly at odds with the circuit court's earlier acknowledgment that "it is helpful to consider the context and history of the statute." *See id.* at 6a. In addition, it is at odds with common sense. If the circuit court viewed legislative history and context as irrelevant, then why did it devote the better part of its discussion of intent to those matters?

E. The Circuit Court's Failure To Follow This Court's Precedents Plainly Warrants The Granting Of Certiorari

The failure of a court of appeals to follow the precedents of this Court is a well recognized basis for granting certiorari. *See, e.g.*, SUP. CT. R. 10(1)(c); *Army & Air Force Exch. Serv. v. Sheehan*, 456 U.S. 728, 733 (1982). That is all the more true where the issue involved is the Eleventh Amendment and where the upshot of failing to follow precedents is the denial of a State's Eleventh Amendment immunity. *See, e.g., Dellmuth*, 491 U.S. at 227-28 ("[A]brogation of sovereign immunity upsets the fundamental constitutional balance between the Federal Government and the States. . . . ").

As this Court has so often recognized, the Eleventh Amendment is of critical importance to our federalism. *See, e.g., Atascadero*, 473 U.S. at 242. It is a "fundamental" rule of jurisprudence that plays a "vital role" in the federal system. *See id.* It does no less than establish the "constitutional balance between the Federal Government and the States." *See id.* Moreover, it is a limitation on the federal judicial power conferred by Article III of the Constitution. *See, e.g., Pennhurst*, 465 U.S. at 98.

Considering the importance of the interests that are implicated, the failure of a circuit court to follow the precedents of this Court in addressing Eleventh Amendment immunity should not be allowed to go unchecked. The State of Illinois is entitled to a full consideration of the issue of immunity in a manner consistent with the law established by this Court. That has yet to occur, and only this Court can rectify the problem.

II. IN CONCLUDING THAT THE FOURTEENTH AMENDMENT IS A PLENARY SOURCE OF POWER FOR REGULATING CONSTITUTIONAL STATE ACTION, THE CIRCUIT COURT FUNDAMENTALLY MISAPPLIED *BOERNE* AND *KATZENBACH*

In the wake of *Seminole Tribe* and then *Boerne*, a number of courts have been asked to address the power of Congress to abrogate Eleventh Amendment immunity under the Fourteenth Amendment. As the circuit court noted in this case, however, the decisions rendered have led to a "disarray" among the circuits. That characterization by the circuit court is actually somewhat charitable.

Particularly in the area of employment law, the circuit courts as well as the district courts have had a very difficult time applying *Seminole Tribe* and *Boerne*. The result has been that there is little consistency in the results of their analyses or in the rationales utilized. Further guidance from this Court is most certainly called for, especially since it involves a matter of considerable importance.

The proper resolution of this issue often dictates (as it did here) whether or not a State will be subject to suit in federal court. On a matter as significant as the Eleventh Amendment, the disarray noted by the circuit court cannot be allowed to persist. The determination of whether a State is subject to suit in federal court obviously should not depend on the fortuity of what circuit that State happens to be in.

A. The Standard Set By This Court In *Katzenbach* And *Boerne*

The Fourteenth Amendment prohibits state action that "den[ies] to any person within its jurisdiction the equal protection of the laws." *See* U.S. CONST. amend. XIV, § 1. Although the Fourteenth Amendment is largely self-executing, Section 5 of the Fourteenth Amendment does grant Congress the "remedial" power to pass legislation to "enforce" the provisions of the Amendment. *See* U.S. CONST. amend. XIV, § 5; *see also Boerne*, 117 S. Ct. at 2164-67.

In *Boerne*, this Court addressed the limits of Congress' power to regulate state action under Section 5, ruling that the legislative authority of Congress is strictly limited to legislation that is "remedial" in effect. *See Boerne*, 117 S. Ct. at 2164-67. Conversely, this Court rejected any suggestion that the Fourteenth Amendment gives Congress the power to enact substantive legislation. *See id.*

As recognized in *Boerne*, the authority of Congress to pass legislation under the Fourteenth Amendment is limited to enforcing and punishing actual constitutional violations, as those violations are themselves defined by the federal courts. *See Boerne*, 117 S. Ct. at 2164. If such a limitation were not imposed, Congress would no longer be enforcing the Fourteenth Amendment but would instead be defining for itself what does and does not amount to a constitutional violation. *See id.* at 2164, 2168.

This Court's decision in *Boerne* was, of course, an outgrowth of its earlier decision in *South Carolina v.*

Katzenbach, 383 U.S. 301 (1966). In *Katzenbach*, this Court held that the Voting Rights Act was appropriate legislation under the provisions of the Fifteenth Amendment, notwithstanding the fact that some of its provisions prohibited what was otherwise constitutional state action. *See Boerne*, 117 S. Ct. at 2163, 2166-68. Although the Court in *Katzenbach* upheld bans on practices that were not unconstitutional on their face (*e.g.*, literacy tests), it did so only after satisfying itself that extensive congressional findings demonstrated these practices were in fact applied discriminatorily and intentionally so as to prevent the enjoyment of the basic right to vote secured by the Fifteenth Amendment. *See Katzenbach*, 383 U.S. at 333-35.

In particular, the Court found that in enacting the Voting Rights Act, Congress was faced with "extraordinary" circumstances, including "nearly a century of systematic resistance" to basic constitutional guarantees. *See Katzenbach*, 383 U.S. at 328, 335 ("exceptional conditions can justify legislative measures not otherwise appropriate"). In *Katzenbach*, this Court expressly based its decision on the extraordinary conditions that then prevailed in certain areas of the South. *See id.* at 308-13. The Court recognized those conditions as,

> an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution.

Id. at 309. It was, therefore, those "exceptional conditions" that warranted the exception to the general rule (*i.e.*, that Congress generally has no authority under the

Fourteenth or Fifteenth Amendments to regulate constitutional state action).[9]

Boerne reaffirmed that the "exceptional conditions" that warranted the outcome in *Katzenbach* are truly exceptional and will only occur in the rarest of cases. *See Boerne*, 117 S. Ct. at 2169-70. The regulation of constitutional state action under the Fourteenth Amendment will only be tolerated when the legislation in question is "adapted to the mischief and wrong which the Fourteenth Amendment was intended to provide against." *See id.* at 2170. Moreover, any attempt to regulate constitutional state action under the guise of the Fourteenth Amendment must necessarily meet the test of "congruence and proportionality," such that the means adopted are carefully tailored to address the specific injury that is to be prevented. *See id.* at 2164. Any legislation that does not meet these standards is properly considered "substantive" and outside the permissible scope of the Fourteenth Amendment. *See id.*

As demonstrated below (*see* disc. *infra* at 21-23), the Equal Pay Act does not begin to satisfy the requirements of *Katzenbach* and *Boerne*, and in reaching a contrary conclusion, the circuit court acted in a manner directly in conflict with this Court's rulings.

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[9] Although *Katzenbach* involved the Fifteenth Amendment rather than the Fourteenth Amendment, this Court recognized in *Boerne* that *Katzenbach* is the most authoritative pronouncement on the scope of Congress' legislative authority under the enforcement clauses contained in the Civil War Amendments. *See Boerne*, 117 S. Ct. at 2166-67, 2169-70.

B. The Equal Pay Act Prohibits Constitutional State Action

Under the standards set by this Court, there can be no doubt that the Equal Pay Act is not valid legislation under the Fourteenth Amendment. As an initial matter, there is no dispute that the Equal Pay Act prohibits constitutional state action. *See* App. at 19a. The circuit court has itself repeatedly held that the Equal Pay Act "creates a type of strict liability in that no intent to discriminate need be shown." *See, e.g., Fallon v. Illinois*, 882 F.2d 1206, 1213 (7th Cir. 1989) (quoting *Patkus v. Sangamon-Cass Consortium*, 769 F.2d 1251, 1260 n.5 (7th Cir. 1985)). Under the Equal Pay Act, any difference in employment outcomes between women and men establishes a *prima facie* violation. *See id.* Liability may thus be imposed without any showing whatsoever of intentional discrimination. *See, e.g., id.* Moreover, under this strict liability regime, punitive damages may be assessed unless the defendant can affirmatively demonstrate its own good faith. *See, e.g., Joiner v. City of Macon*, 814 F.2d 1537, 1538-39 (11th Cir. 1987) (an employer who violates the Equal Pay Act is liable for liquidated damages unless it can prove that its violation was in good faith and based upon reasonable grounds).

In sharp relief to the terms of the Equal Pay Act, this Court has consistently held that intent is a touchstone of any form of unconstitutional discrimination.[10] *See*

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[10] By its very terms, the Equal Pay Act allows a finding of discrimination based solely on disparate impact. *See* 29 U.S.C. § 206(d)(1). More than twenty years ago, however, this Court

Washington, 426 U.S. at 244-45. Only "*purposeful* [gender] discrimination . . . offends the Constitution." *See Personnel Adm'r v. Feeney*, 442 U.S. 256, 274 (1979) (emphasis added). Stated otherwise, the Constitution is only violated when a decision maker "select[s] or reaffirm[s] a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *See id.* at 279. The Constitution, therefore, requires purposeful discrimination, whereas the Equal Pay Act plainly does not. As such, the Equal Pay Act clearly proscribes conduct that is not unconstitutional.

C. The Circuit Court Failed To Apply The *Boerne* Test

In its opinion below, the circuit court itself admitted that the Equal Pay Act "proscribes some constitutional conduct." *See* App. at 21a. Under *Boerne*, however, that necessarily means that the Equal Pay Act could only be justified if it was a tailored response to address a specific constitutional violation by the States themselves. *See*

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explicitly rejected the notion that disparate impacts violate the Fourteenth Amendment absent evidence of discriminatory intent. *See Washington v. Davis*, 426 U.S. 229, 245-48 (1976); *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264-65 (1977). In this important respect, the Equal Pay Act *is* strikingly similar to the Religious Freedom Restoration Act (the statute invalidated in *Boerne*)—Congress seeks to justify under its Fourteenth Amendment authority legislation that directly contradicts this Court's governing precedent regarding the scope of the Fourteenth Amendment. *See Boerne*, 117 S. Ct. at 2160-61.

Boerne, 117 S. Ct. at 2164, 2168. Evidence of general societal discrimination would not begin to meet the standard set in *Boerne*. *See id.* at 2168-69; *see* disc. *infra* at 27-28.

The circuit court found no evidence whatsoever that in passing the 1974 Amendments to the Fair Labor Standards Act, Congress identified any instances of violations of constitutional rights by the States. *See* App. at 20a-22a. Instead, the goal of Congress in adding the amendments was (as recognized by the circuit court) simply to apply the minimum wage and overtime provisions of the Fair Labor Standards Act to state employees, which provisions ironically can only be enforced against the States in state court. *See id.* at 15a; *see also Aaron*, 115 F.3d at 816-18. In fact, the Seventh Circuit found only one reference to the Equal Pay Act in the Senate Committee's report, and that reference was in the discussion of the statute's historical background. *See* App. at 15a.

Unable to find any evidence of constitutional violations by the States, the circuit court instead found that Congress enacted the Equal Pay Act "to remedy what was perceived to be a serious and endemic problem of employment *discrimination in private industry.*" *See* App. at 21 a (quoting *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974)) (emphasis added). This finding by the circuit court is really quite extraordinary, as it could not possibly justify the regulation of behavior by the States. *See* U.S. CONST. amend. XIV (prohibiting certain kinds of *state action*); *see also Boerne*, 117 S. Ct. at 2169-70 (relying entirely on the lack of discrimination by the States themselves in determining that the Religious Freedom Restoration Act was improper substantive legislation).

Evidence of discrimination in private industry is simply irrelevant to the Fourteenth Amendment, and it is certainly not a proper justification for prohibiting otherwise constitutional behavior by the States. *See Boerne*, 117 S. Ct. at 2168-69 (relying entirely on state action). When legislation cannot be justified by the slightest evidence of unconstitutional behavior by the States, it is extremely difficult to understand how such legislation could be considered a "proportional and congruent" remedy designed to prevent identified constitutional violations.[11]

Before being deprived of its right to Eleventh Amendment immunity, the State of Illinois is entitled to a proper determination of whether Congress made any finding that the States themselves have violated the constitutional rights of their citizens. No evidence was offered (nor is there any) that the State of Illinois has intentionally engaged in gender discrimination. The conclusion by the circuit court that a finding of discrimination in *private industry* would suffice is, therefore, palpably insufficient. If *Katzenbach* and *Boerne* are to mean anything, the circuit court's analysis cannot be allowed to stand.

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[11] Any notion that Congress has the power to pass Fourteenth Amendment legislation merely because it is "consistent" with "Fourteenth Amendment values" can only be sustained if one assumes "that Congress can define rights wholly independent of [the Supreme Court's] case law." *See Humenansky*, 152 F.3d at 826-27 (quoting *EEOC v. Wyoming*, 460 U.S. 226, 262-263 (1983) (Burger, C.J., dissenting)). Such a finding, however, would " fundamentally alter[ ] our scheme of government." *See id.; see also Boerne*, 117 S. Ct. at 2168.

D. The Circuit Court Failed To Address The Specific Statutory Provision At Issue Here

For the reasons set forth above (*see* disc. *supra* at 21-23), the Equal Pay Act as a whole does not and cannot meet the test articulated by this Court in *Boerne*. That conclusion is all the more inescapable, however, when one considers the specific provision of the Equal Pay Act that is at issue in this matter, namely the forum selection clause. Tellingly, the circuit court did not even bother to apply the *Boerne* test to that provision, choosing to instead speak of the statute in generic terms. *See* App. at 20a-22a.

The provision of the Equal Pay Act that the circuit court found to abrogate Eleventh Amendment immunity was, of course, the forum selection clause. *See* App. at 8a. The forum selection clause of the Equal Pay Act, however, is in no way, shape or form a "proportional or congruent" response to any identified harm. In fact, the circuit court did not even examine under *Boerne's* "congruence and proportionality" test the very provision of the Equal Pay Act that it found requires the States to defend themselves in federal court. *See id.* at 20a-22a. Nowhere in its opinion does the circuit court address whether the Equal Pay Act's forum selection clause could possibly be justified under *Boerne's* ends-and-means calculus.[12] *See id. But see*

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[12] Obviously, each of the Equal Pay Act's provisions must be considered under *Boerne's* " congruence and proportionality" test. After all, the Fourteenth Amendment is the source of authority for each provision. In *Katzenbach*, for instance, this Court carefully examined each contested provision of the Voting Rights Act. *See Katzenbach*, 383 U.S. at 315-37. Rather than

Katzenbach, 383 U.S. at 315-37 (examining each provision of the Voting Rights Act individually). The circuit court's opinion is just silent on the issue. *See* App. at 20a-22a.

Had the circuit court considered whether the forum selection clause is a remedy "proportional" to the harm it purports to correct, it is incontestable that that provision would have failed the test. *See Boerne*, 117 S. Ct. at 2164 ("There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."). The only effect of abrogation is to require the States to defend themselves in federal court rather than state court. But neither the Seventh Circuit nor any of the circuit courts that have addressed statutes in the wake of *Boerne* have suggested that a federal forum is necessary (or even desirable) to prevent or remedy any injury.[13]

There is, to the contrary, every reason to believe that state courts are fully capable of resolving the types of claims at issue in this case. Like Illinois, virtually every State has strong antidiscrimination laws of their own.[14]

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granting a blanket endorsement of the entire statutory scheme proposed by Congress, each provision was considered individually by this Court to ensure that each provision was a properly circumscribed tool for the limited purpose of preventing violations of the Fourteenth Amendment. *See id.* The same is required here.

[13] Plaintiffs have likewise never suggested (nor could they) that a state forum would be in any way hostile to their claims.

[14] Forty-one States (including Illinois) have their own civil rights acts and/or equal pay acts. *See, e.g.*, 775 ILCS 5/1-101, *et seq.*, App. at 62a-79a; W. Va. Code Sec. 5-11-9; La. Rev. Stat. Ann. Sec. 301-334; Iowa Code Sec. 216.1-216.20; Utah Code Ann. Sec. 34A-5-106.

For example, the Constitution of the State of Illinois affirmatively prohibits discrimination on the basis of gender by state and local governments. *See* App. at 61a.[15] Moreover, the Illinois Human Rights Act outlaws employment discrimination and sexual harassment by any employer, including the State and its instrumentalities. *See id.* at 62a-79a. Given these provisions, no one could seriously claim that the courts of the State of Illinois are in any way hostile or unsympathetic to the sorts of claims being made by Plaintiffs in this case. *See id. at* 61a-79a.[16] In fact, it is undisputed that state courts would provide Plaintiffs with a full and fair opportunity to be heard. *See id.*

The complete absence of any suggestion (let alone evidence) that Illinois state courts are not a suitable forum for Plaintiffs' claims calls into serious question the circuit court's conclusion that the Equal Pay Act is itself a "congruent and proportional" remedy to a legitimate Fourteenth Amendment injury. *See* App. at 17a-22a. Since the only effect of the circuit court's determination is the abrogation of Eleventh Amendment immunity, it surely cannot be said that consideration of the need for a federal forum is irrelevant in determining whether the statute is "congruent and proportional" to its ends. That question,

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[15] Relevant portions of the Constitution of the State of Illinois and the Illinois Human Rights Act are reprinted in the Appendix at 61a-79a.

[16] Indeed, this Court has oft recognized that state courts and their judges are the equal of their federal counterparts. *See, e.g., Atascadero*, 473 U.S. at 238 n.2 ("It denigrates the judges who serve on the state courts to suggest that they will not enforce the supreme law of the land.").

left entirely open by the circuit court's opinion, is deserving of an answer, especially given the importance of the Eleventh Amendment. That answer, however, must come from this Court.

E. The Disarray In The Circuits Is An Independent Reason For Granting Certiorari

As the circuit court acknowledged, the uncertainty over the proper application of this Court's decision in *Boerne* has led to "disarray" in the courts of appeals. *See App.* at 20a n.12. The decisions fall into two groups.

1. The Conflicting Decisions

One group of decisions has interpreted *Boerne* to only require a general finding *of societal discrimination* in order to pass muster as "remedial" legislation under the Fourteenth Amendment. *See* App. at 21a (Equal Pay Act passed "to remedy what was perceived to be a *serious and endemic problem of employment discrimination in private industry.*") (emphasis added); *see also Coger v. Board of Regents of the State of Tennessee*, 154 F.3d 296, 305-07 (6th Cir. 1998); *Kimel*, 139 F.3d at 1437-44 (Hatchett, C.J., concurring in part and dissenting in part); *Goshtasby v. Board of Trustees of the University of Illinois*, 141 F.3d 761, 772 (7th Cir. 1998); *Coolbaugh v. Louisiana*, 136 F.3d 430, 436 (5th Cir. 1998); *Humenansky*, 152 F.3d at 830 (Bataillon, J., dissenting). According to these decisions, once *discrimination* is documented (be it private or public), Congress has wide latitude to fashion remedies that address the problem of societal discrimination. *See Kimel*, 139 F.3d at 1439.

Those remedies may then be applied against the States pursuant to the Fourteenth Amendment power, unless they are somehow "disproportionate" to the general societal discrimination that they are designed to address. *See, e.g.*, App. at 22a (finding that the Equal Pay Act's "statutory provisions are reasonably tailored to remedy intentional gender-based wage discrimination" and are clearly related to "the letter and spirit of the Fourteenth Amendment"). It is significant, however, that none of these cases address (much less explain) why the abrogation remedy is necessary or proportional to the generalized finding of discrimination. *See, e.g., id.* at 17a-22a.

A second group of decisions has interpreted *Boerne* more strictly. *See Humenansky*, 152 F.3d at 825-28; *Kimel*, 139 F.3d at 1445-1449 (Cox, J., concurring in part and dissenting in part); *Coolbaugh*, 136 F.3d at 440 (Smith, J., dissenting). Under these decisions, a statute is deemed to be "remedial" legislation only if two conditions are met. First, Congress must identify a documented pattern of constitutional violations by the States that would justify prohibiting constitutional state action. *See Boerne*, 117 S. Ct. at 2166-69; *see also Humenansky*, 152 F.3d at 827 (ruling that isolated instances of discrimination would not justify application of Section 5 power to prohibit constitutional state action); *Kimel*, 139 F.3d at 1449 (Cox., J., concurring in part and dissenting in part) (the Americans with Disabilities Act is not valid enforcement legislation because it "was unaccompanied by any finding that widespread violation of the disabled's constitutional rights required the creation of prophylactic remedies"). Second, the legislation must be a "congruent and proportional" response to the specific *constitutional violations identified*. *See Boerne*,

117 S. Ct. at 2164, 2169 ("the appropriateness of remedial measures must be considered in light of the evil presented"); *see also Kimel*, 139 F.3d at 1446 (Cox, J., concurring in part and dissenting in part).[17]

As the latter cases recognize, the starting point for justifying any legislation that prohibits constitutional state action must be evidence of a pattern of actual *constitutional violations* by the States. *See, e.g., Humenansky*, 152 F.3d at 827; *Kimel*, 139 F.3d at 1449 (Cox., J., concurring in part and dissenting in part). Private acts of discrimination do not implicate the Fourteenth Amendment, and as a result, generalized findings of societal discrimination are irrelevant to the Fourteenth Amendment inquiry. *See* U.S. CONST. amend. XIV (proscribing certain types of *state action*). They are certainly insufficient evidence for allowing Congress to legislate beyond the terms of the Fourteenth Amendment and in derogation of the Eleventh Amendment. *See id.* Furthermore, *Boerne* requires that any *remedy* must be carefully tailored to address identified constitutional violations. *See Boerne*, 117 S. Ct. at 2169; *Kimel*, 139 F.3d at 1446. A remedy cannot, therefore, be applied to the States as a by-product of statutes primarily

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[17] The "disarray" noted by the Seventh Circuit is not limited to the circuit courts. *Compare Larry v. Board of Trustees of the Univ. of Alabama*, 975 F. Supp. 1447, 1449-50 (N.D. Ala. 1997) (holding that the Equal Pay Act is impermissible substantive legislation because it does not require a showing of intent as required by this Court's decision in *Washington v. Davis*) *with Belch v. Board of Regents of the Univ. Sys. of Georgia*, No. 3:94-CV-129(DF), 1998 WL 824497, *7-9 (M.D. Ga. Nov. 20, 1998) (holding that the Equal Pay Act is appropriate remedial legislation).

designed to address private discrimination. *See Boerne*, 117 S. Ct. at 2164, 2168; *see also Kimel*, 139 F.3d at 1446 (Cox, J., concurring in part and dissenting in part); *see also Coolbaugh*, 136 F.3d at 430, 440 (Smith, J., dissenting). Yet that is exactly what happened here.

2. The Disarray In The Circuits Needs To Be Resolved

The State of Illinois respectfully submits that the narrower interpretation of Congress' power under Section 5 (as reflected in the second group of decisions) is the only appropriate reading of this Court's previous rulings. As discussed above (*see* disc. *supra* at 18-20), the Voting Rights Act was and is the only statute prohibiting constitutional state action that the Supreme Court has ever approved in this century as an exercise of Fourteenth and Fifteenth Amendment authority. *See Boerne*, 117 S. Ct. at 2163. In that instance, this Court was driven by "exceptional" circumstances and the "extraordinary" need arising from the organized resistance *by the States themselves* to the extension of the right to vote. *See Katzenbach*, 383 U.S. at *passim*. Similarly, the remedies then at issue were tailored to the specific constitutional violations by the States. *See, e.g., id.* at 333-35.

Nothing in *Katzenbach* or its progeny, however, suggests or implies that prohibition of otherwise constitutional state conduct could be justified merely by demonstrating the widespread existence of private racial discrimination. Indeed, *Katzenbach* suggests just the opposite. *See Katzenbach*, 383 U.S. at 328-34 (holding there must be evidence of intentional action by the States that

is designed to deprive citizens of their constitutional rights).[18]

Whatever the ultimate resolution of this issue is, the disarray in the lower courts must be addressed. The number of fractured and conflicting opinions continues to grow, affecting the basic constitutional rights of the States in hundreds of different lawsuits involving a spectrum of employment statutes. This Court has repeatedly recognized that the proper application of the Eleventh Amendment preserves the fundamental constitutional balance in our federal system. *See Atascadero*, 473 U.S. at 242. No question could be more important than resolving the confusion on this issue that currently reigns in the lower courts. *See, e.g., Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 649 n.9 (1981) (granting certiorari when there is disagreement among the lower courts on an important issue of constitutional interpretation).

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[18] Application of the *Boerne* proportionality standard is, of course, also informed by the constitutional presumption against abrogation. As this Court stated in *Seminole Tribe*, the Eleventh Amendment embodies the presumption "that each State is a sovereign entity . . . [and] it is inherent in the nature of sovereignty not to be amenable to suit of an individual without its consent." *See Seminole Tribe*, 517 U.S. at 54; *see also Atascadero*, 473 U.S. at 243 (the Eleventh Amendment is a jurisdictional limitation). This presumption is just as applicable to *Boerne's* proportionality inquiry as it is to the statutory construction inquiry in *Dellmuth* and *Atascadero*.

CONCLUSION

For the reasons stated, the petition for certiorari should be granted.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

BOARD OF TRUSTEES OF UNIVERSITY OF ALABAMA, ET AL., Petitioners	:	No. 99-1240
v.	:	
PATRICIA GARRETT, ET AL.,	:	

Washington, D.C.
Wednesday, October 11, 2000

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

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MICHAEL GOTTESMAN, ESQ., Washington, D.C.; on behalf of the Respondents.

SETH P. WAXMAN, ESQ., Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States.

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[3] PROCEEDINGS

(10:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 99-1240, the Board of Trustees of the University of Alabama v. Patricia Garrett.

Mr. Sutton.

ORAL ARGUMENT OF JEFFREY S. SUTTON

ON BEHALF OF THE PETITIONERS

MR. SUTTON: Thank you, Mr. Chief Justice, may it please the Court:

In enacting the Americans with Disabilities Act in 1990, Congress invoked its powers to regulate interstate commerce and to enforce the Fourteenth Amendment. We do not challenge Congress' authority to pass the ADA under the Commerce Clause and, indeed, doubt anyone ever would bring such an across-the-board attack on the law, yet it is precisely the virtues of the ADA as a matter of Commerce Clause legislation, its breadth of coverage, its exacting accommodation requirements, that make it unsustainable as a section 5 law.

Now, before this Court has authorized Congress to impose extra constitutional duties on the States, it has required the Congress to show that the States brought this loss of authority upon themselves first by engaging in a widespread pattern and practice of unconstitutional

[4] conduct and, second, by showing that the remedial legislation is proportionate and congruent in nature.

QUESTION: Let's –

QUESTION: Mr. Sutton, there were congressional findings that there has been discrimination against the disabled in voting, health services, transportation, education, and so on, and there are numerous examples in the legislative record, and those are areas of traditional State control. Do you think that those findings are somehow false, or not relevant in some way, or that the discrimination is just not unconstitutional, or what?

MR. SUTTON: Your Honor, they're exceedingly relevant, and they certainly sustain the ADA as matter of Commerce Clause legislation, but just as with Kimel and the age laws they refer only to discrimination in general.

They don't establish constitutional violations.

QUESTION: Well, that's what I'm trying to press you on a little bit, because the findings in some instances are in areas that are under traditional State control.

MR. SUTTON: That's true, Your Honor, and there's no doubt if we had a situation where Congress had actually identified constitutional violations in these areas of State control, Congress would have section 5 authority.

[5] QUESTION: Did the findings distinguish at all between discrimination that was the result of the State as opposed to, say, the county or the city?

MR. SUTTON: Not at all, Your Honor. There's no distinction whatsoever between State, city and county when it comes to constitutional violations. It's usually

just local government and State government generically put together, but the key point is in the ADA the age laws, in the statement of purpose and findings, it was exactly the same. In fact, in the age –

QUESTION: Why isn't it a constitutional violation when one witness said, the Essex Junction School System said they were not hiring me because I was using a wheelchair?

MR. SUTTON: Well, Your Honor, it might well be a constitutional violation, but the fact of the matter is that particular allegation was won by just one side of the dispute.

QUESTION: Well, I mean, I pick that out because the SG's brief is filled with references, and we have all these amicus briefs that are filled with references along the lines I just said.

Now, if I – is it that I'm supposed to count all those, and they have a whole lot here in a huge stack of briefs, and count them all and then say, well, they're [6] just not enough, or there are enough? Why wouldn't, say, 200 instances like that be enough?

MR. SUTTON: Well, the first problem, Your Honor, is that it wouldn't be a remedial section 5 problem because, if those allegations are true, if there's no rational explanation for what was done they all violate State law. They would – all 50 States by 19 –

QUESTION: Well, they tell us, for example, that a lot of States didn't have laws, to use this case, involving cancer, or perceptions of handicap which really weren't, and then they list all kinds of flaws in those laws in these

briefs, and I suppose they're probably right in terms of the facts here.

MR. SUTTON: But Your Honor, the risk is one of constitutional violation.

QUESTION: Well, I mean, that's what I'm asking.

That's what I'm trying to get to. Why isn't it a constitutional violation where Congress has lots and lots of instances of States that seem to discriminate against handicapped people under instances where, given the information in front of them, for some reason or other, these handicapped people have not been able successfully to avail themselves of State law.

MR. SUTTON: Your Honor, those would be relevant if Congress had made a second finding, which is just [7] critical and is what is exactly missing here, and that finding had been, despite this conduct by States in local areas of local control, the States weren't enforcing the very antidiscrimination laws they had on the books.

Let's draw an analogy to the race cases. If in the early sixties every State in the country banned literacy tests, all right, banned the very thing Congress was trying to get at, it would not be enough for Congress to say literacy tests are causing problems. They would have to make a second showing which is, the States are not enforcing their laws on the books.

QUESTION: So if, in fact, in the sixties, there had been discrimination in the South, and we discovered there was a State law banning racial discrimination, Congress would not have been able to pass laws against racial discrimination in your view without –

MR. SUTTON: In the early sixties they would have been, because I think in the early sixties you would have been able to show that the States, those were shams. They were statutory Potemkin villages. They meant nothing.

QUESTION: And today? What about today?

MR. SUTTON: There's no showing on that front, not at all, Your Honor. There's no – Congress did not even look in the direction. It's true they looked in the [8] direction of – excuse me.

QUESTION: Let me ask you, suppose we have a real case or a hypothetical case along the lines described by Justice Breyer, a very egregious case, a person absolutely confined to a wheelchair. That person can't get into the court hearing on time, or can't get into a voting booth, and you have an insensitive State official. In that single discrete case, could there be an action brought under the Equal Protection Clause to compel the access, compel access to the court, compel access to the building?

MR. SUTTON: Well, I think you've got two possible issues there, one what type of review, would that be a rational basis setting, or because it's a –

QUESTION: That's why I'm asking.

MR. SUTTON: – fundamental right, and so therefore would you have heightened review.

I think there would be situations in which you might bring a constitutional claim, but – and I hope I'm getting to your point –

QUESTION: Would the court be wrong to say that there's a quasi – would the court be wrong to say there's a quasi-suspect class here, or suspect class?

MR. SUTTON: I don't think the issue would be changing rational basis scrutiny. The issue would be [9] whether it's a voting rights problem which gets heightened review, but Your Honor, the key point on voting, access to courthouses and access to voting booths, the ADA does not correct that problem.

To the extent you think that was the constitutional problem the ADA was getting at, it exempted all –

QUESTION: Well, what I'm trying to find out –

QUESTION: Mr. –

QUESTION: – is if there's ever an equal protection violation on a stand-alone discrete case –

MR. SUTTON: Mm-hmm.

QUESTION: – where a State discriminates against a person by reason of a severe handicap.

MR. SUTTON: That –

QUESTION: Does that state an equal protection violation, and if it does, why is it that the courts can do what Congress cannot? That's the line of inquiry I –

MR. SUTTON: Why is it that the courts have more authority here to limit that type of State conduct than Congress?

QUESTION: Yes. It would seem that that's one consequence of your argument, and I want you to address it.

MR. SUTTON: Well, Your Honor, I think if it [10] were – if I were in the situation where I was saying the courts had more remedial authority than the Congress I'd have a real problem, because of course that's not what's going on. The point of section 5 is to give Congress remedial authority.

But the point I'm trying to make on the courthouse access to buildings point is that that's not something the ADA addresses. The Congressional Record shows that by 1990 every State in the country had an architectural barriers law that precluded the building of new buildings that didn't have access.

QUESTION: But you're willing to concede, apparently, that it is a constitutional violation not to make special provision in public buildings for those who are handicapped.

MR. SUTTON: Well –

QUESTION: That is a denial of equal protection of the laws.

MR. SUTTON: I'm not willing to concede that, Your Honor, because –

QUESTION: Do you know of any case that has held that?

MR. SUTTON: I don't, Your Honor and I would, in fact, point the Court to Alexander –

QUESTION: When Congress was speaking of [11] discrimination could it possibly have been referring to the statutory definition of discrimination?

MR. SUTTON: Absolutely, and there's no doubt that's what they were referring to.

QUESTION: Is there any compatibility between that and the constitutional requirement of equal protection?

MR. SUTTON: There's not. In fact, of all the Federal –

QUESTION: I don't know why you're running away from it. It seems to me that's the core issue in this case.

QUESTION: Mr. Sutton –

QUESTION: Whether, in fact – whether, in fact, making special accommodation for those who are handicapped, or the failure to do so, is a violation of the Constitution. I think if it is your case is a hard one.

MR. SUTTON: It's not, and there's no Federal civil rights statute –

QUESTION: But Mr. Sutton, isn't this an employment case rather than an access case?

MR. SUTTON: Well, Your Honor, it's a challenge to the ADA across the board. There's just one abrogation –

QUESTION: But the particular claims are [12] employment claims, and is it not at least theoretically possible that refusal of employment to a person because of a handicap would be an equal protection violation, regardless of whether the access provision was?

MR. SUTTON: Well, if there were only arbitrary justifications for a decision –

QUESTION: Should they have ruled –

MR. SUTTON: – you have no problem.

QUESTION: – that nobody with an artificial limb can ever have a job of a certain character? You could say that wouldn't pass the rational basis test, couldn't you?

MR. SUTTON: There's no evidence, Your Honor, that there are any such State laws –

QUESTION: No, but in that kind of a hypothetical you would agree that that could be a constitutional violation?

MR. SUTTON: If there were – no – if all you had were arbitrary justifications for that law, of course you would. That's City of Cleburne, and that's all of the equal protection cases.

QUESTION: If there were no rational basis for it, in other words.

MR. SUTTON: Absolutely, Your Honor.

QUESTION: But there might be a rational basis [13] for refusing to hire a teacher who was in a wheelchair –

MR. SUTTON: If this Court's –

QUESTION: – if only that the school is not properly equipped to accommodate such a teacher.

MR. SUTTON: This Court said that very thing in a case involving the Federal Government, where it said budgetary constraints alone can state a rational basis.

QUESTION: How about Justice Stevens' hypothesis, a man with an artificial limb turned down for a teacher,

just without any real basis for it, you know, we're just afraid we might not be able to handle you.

MR. SUTTON: Well, if there –

QUESTION: That would be arbitrary.

MR. SUTTON: I think that is arbitrary, and I think that would be a problem. The question, though, is whether there was evidence of that going on in the eighties, number 1, and number 2, were State laws against that very thing not being enforced.

QUESTION: Well, assuming there was evidence of that kind of discrimination, I really don't understand the argument that the fact that there are State remedies also available makes it impermissible for there to be a Federal remedy.

MR. SUTTON: Oh, there can be a Federal remedy, [14] and that's why the Commerce Clause legislation is fine.

The question is whether you can trump –

QUESTION: No, I –

MR. SUTTON: – the Tenth or Eleventh Amendment.

QUESTION: Why couldn't there be a Fourteenth Amendment Federal remedy, even though there also was a State remedy? I don't quite understand the thrust of your main argument.

MR. SUTTON: Because the very point of section 5 is to correct State conduct that violates the Constitution, and if the States aren't violating the Constitution, one –

QUESTION: Yes, but the fact that a State remedy exists does not necessarily mean that discrimination is not taking place.

MR. SUTTON: I agree entirely, and that's why one has to look at whether the State laws are being enforced.

QUESTION: So I take it if you went back to Justice Breyer's example and used the hypothesis of maybe 200 examples – I don't know how many we've got, but maybe that many were adduced – and in each of those instances Congress had said not only, we find here is an example of an instance of discrimination, but Congress had also expressly said, and we find that in this example there was [15] no enforcement of State law to correct it, and it had matched its 200 examples with 200 examples of State failure to enforce, do I understand your position to be that then there would be an adequate legislative predicate under section 5?

MR. SUTTON: Yes, and I – the answer is yes, but I just want to –

QUESTION: So that if you win this case, Congress could go back and dredge up from its record its 200 examples and, if Congress said well, we now – you know, we've checked into this, and in each of these examples there was no State enforcement, Congress could then pass the act again under section 5 and it would – on your view would be valid?

MR. SUTTON: No. Yes to the first, but no to the second.

QUESTION: Okay.

MR. SUTTON: The second problem with the ADA is, it's unlike any section 5 law to my knowledge ever enacted, and certainly ever upheld by the Court, in the sense that it truly is a constitutional amendment in section 5 clothing. It applies not just to every State, but every form of Government service that ever existed or ever will exist.

That truly is evading Article 5 and the [16] requirement that two-thirds of each House approve a constitutional amendment and, most importantly, the States, three-fourths of them, get an opportunity to change it, and that's exactly what would happen, and that's what would be very risky about allowing that hypothetical to justify the ADA.

QUESTION: Mr. Sutton, would you – I thought we were talking just about the employment section, those of the ADA, but you're saying no, it's broader than that.

MR. SUTTON: Your Honor, we've briefed the case that it is all of the ADA. There's just one abrogation provision that applies to, you know, title I, title II, and title IV, so I'm not sure how you could slice it that we're just dealing with employment, but if, Your Honor, we were dealing with employment, and you had Justice Souter's hypothetical, 200 instances, just employment, States refusing to enforce, sure, you would have a problem.

QUESTION: Well, you would want to know, wouldn't you, Mr. Sutton, whether these 200 instances were, quote, discrimination, close quote, in the sense that Congress used it, or discrimination in the sense that it's used in the City of Cleburne –

MR. SUTTON: Well, I –

QUESTION: – as that's different.

MR. SUTTON: Well, I assume, Justice Souter, [17] that's what you were saying. Yes. I mean, absolutely.

But my – if we're going to talk about this solely as an employment case, which is fine by us, we're perfectly agnostic about the issue, this case is Kimel. I mean, it's exactly like Kimel. It's employment. You've got, in fact, a greater gap between a statutory standard and a constitutional standard, and an equally anemic record when it comes to constitutional violations. I mean, even –

QUESTION: Well, the difference that I wondered about is, Kimel I thought was ambiguous as to whether or not a rational basis test applies, and I'd be interested – I know you're probably aware of the argument, the SG makes it, that rational basis is a test that courts have created in order not to intrude upon the province of the legislature.

But there is no reason to have the province of the legislature not intruding upon the province of the legislature and, therefore, you don't need to apply that strict a matter and should respect the congressional judgment that, in fact, there is unreasonable discrimination being exhibited in these States against handicapped people.

I would like to get your response to that kind of an argument.

[18] MR. SUTTON: Yes, Your Honor. It's an important point. There's no doubt that when it comes to run-of-the-mill legislation, City of Cleburne is right. We need that authority to enact these 50 State laws and the 30

Federal laws that protect the rights of the disabled, so there's just no doubt about that at all.

But in the section 5 context you've got two other issues, the relationship between this Court and its final Marbury power and the relationship between the Congress and the States, and that's why the section 5 inquiries are always different. You've got a zero sum game. Congress' gain is invariably the State's loss, and just as Congress gets a presumption of constitutionality in enacting these 30 Federal disability laws, so do the States get a presumption of constitutionality that when they pass these 50 State laws, 1) they're presumptively good and 2) they're enforcing them.

Now, that can – you know, that's not dispositive, of course. Ultimately, if it turns out the States aren't enforcing them, they're just shams, well then they're [sic] got a problem and, you know, that's why the voting rights laws are –

QUESTION: I don't think the issue is one that is encompassed by getting into presumptions of constitutionality. The issue, I think, that's getting [19] raised is one about, let's say the competence of the courts to make judgments, particularly when we get into the rational basis area to make sound judgments and it seems that the courts are not as good second-guessers there, perhaps, as legislatures may be.

But the fact is, Congress is a legislature, and it is not laboring under the judicial disability as a second-guesser, so why do we – I mean, I go back to the question raised. Why should we apply the same standard that we would if we were dealing with a court's review?

MR. SUTTON: Well, I hope I'm answering both questions. If one is concerned about the institutional capacity of the courts versus Congress in this area, the last thing this Court should be doing in this case is making ultimately these section 5 findings itself, okay.

So if you're going to agree with Justice Breyer and the suggestion in your question, Justice Souter, that there has to be a little more deference to Congress in this area, the last thing the Court should be doing is in a situation where they don't ask the right questions, constitutional violations as opposed to violating a statutory standard, number 1, number 2, are the State laws, all 50 of them on the books being enforced, the last thing anyone's –

QUESTION: You're right, but this is just a [20] question of standard, and you're saying, look, whatever standard you apply, be careful to realize that you don't have, on your view, a sufficient predicate in the record to pass muster on any standard. That's one argument, and I think we understand that, but why should the standard be the same?

MR. SUTTON: Because, Your Honor, it's not easy being the Supreme Court and deciding what the Constitution means in all these cases, but the bottom line is the Marbury power rests here in this building. It doesn't rest anywhere else, and clever arguments about how Congress needs more deference to find out when constitutional violations really exist is just a nice way, a polite way of putting the fact that they across the street get to decide what the Constitution means.

I don't know how else to divide it, but that is what's going on, if they can enact a law that applies to every Government services –

QUESTION: Can I ask you, on this very – the SG has headlined in his brief, S report number 116, at page 18, and in big letters, current Federal and State laws are inadequate. That was right out of the Senate report, so why wouldn't that be a finding that current Federal and State laws are inadequate?

MR. SUTTON: It is a finding, it's entitled to [21] deference, and it applies to the Commerce Clause Article I justification for passing this law. That does not suffice to show there are constitutional violations, and certainly –

QUESTION: The question is, I suppose, inadequate to do what, inadequate to do the good things that need doing?

MR. SUTTON: Absolutely.

QUESTION: Or inadequate to assure compliance with the Constitution of the United States?

MR. SUTTON: Absolutely.

QUESTION: And the report doesn't say the latter.

MR. SUTTON: No, it does not and I invite everyone to read it. That's exactly what's going on.

QUESTION: All right. That's the other question, but that's what you were answering. Why isn't this a constitutional – if Congress finds that there are all these problems going on with the States, and the current State laws are inadequate to help these handicapped people who are

discriminated against, why isn't that sufficient to show the problem that permits them to act under section 5?

MR. SUTTON: I hope – I'm fearful that I'm not – I didn't hear the question, but let me try to [22] answer. You can cut me off as soon as it appears I didn't hear what you were saying.

But they've got to be constitutional violations, Your Honor, and if they're not constitutional violations, they haven't asked the right question.

QUESTION: And they are not constitutional violations because –

MR. SUTTON: That's not the question they were asking. The question they were asking is precisely the one Justice Scalia asked, which is, isn't – is this adequate, can we do a better job. Of course we can do a better job.

You know, I think in 1985 the Court issued two decisions which seemed to me to get right to the heart of the matter. Not only was it –

QUESTION: Why weren't they asking about the constitutionality if they explicitly abrogate the State's immunity?

MR. SUTTON: I've no idea, Your Honor. I've looked through the –

QUESTION: They could only do that under the Fourteenth Amendment.

MR. SUTTON: That's exactly right.

QUESTION: So then they must have been talking about the Fourteenth Amendment.

[23] MR. SUTTON: Not necessarily, Your Honor. That doesn't follow necessarily at all. I mean, one you could have an abrogation provision, and States are free to waive on their own.

QUESTION: Well, Seminole wasn't decided until 1997.

MR. SUTTON: No, until 7 years afterwards, that's exactly right, but I've looked to the Congressional Record trying to find instances where Congress was aware of the section 5 inquiry. I found two. One of them cites Fullilove, Representative Dellums saying there's a broad section 5 power. Fullilove is no longer good law.

The second cites Morgan v. Katzenbach and just has a sentence that says, embracing the broader version of Morgan saying that if there's an antidiscrimination issue out there, Congress can remedy under section 5, but that's not the inquiry, and as early as 1970 it was clear that was not the inquiry in Oregon v. Mitchell, when the Court invalidated Congress' effort to lower the voting age from 21 to 18 in all States in the country.

MR. SUTTON: Mr. Sutton, you've made something in your brief of the absence of a congressional provision to treat the Federal Government, or Federal employment on a par with private sector employment. You emphasized that, but I didn't see the connection between that and the [24] section 5 inquiry that's before us.

MR. SUTTON: Yes, Your Honor. It goes to the second question, not the record issue but the proportionality issue.

Congress purported to be remedying, in their words, a national epidemic regarding disability discrimination, and they decided that in order to do that you needed money damages actions, which is really all that is at stake here in light of Ex parte Young. How can they say that it's a proportionate and necessary tailored remedy when they're not only not imposing it on private business in many instances, but on themselves?

That just doesn't stand. It's not only the failure to lead by example, just direction, but it doesn't show proportionality. I mean, it proves our very point. This was not needed. It's not proportionate to the very problem they were trying to correct.

QUESTION: What is being imposed on State governments that's not being imposed on private employers?

MR. SUTTON: Money damages actions in public accommodations requirement. Title II applies to any form of discrimination plus access to public services. Under title III those provisions, most of those provisions are extended to private businesses, and there are no money damages remedies there, which really proves the difference [25] between the State's ability to lobby, and private businesses.

QUESTION: But with respect to the kinds of cases that we're dealing with, with employment, there are money damages against individuals.

MR. SUTTON: That's true, Your Honor. I mean, again – but if this is an employment case, which is fine by us, it really is controlled by Kimel, because the gap between the statutory standard and the constitutional

standard is even broader in this case than it was in Kimel, and then –

QUESTION: Well, your – I'm sorry.

QUESTION: That's a proposition a little hard to maintain, because in the age discrimination area this Court has never found a violation of the rational basis test, but in the handicapped area we've found a bunch of violations.

MR. SUTTON: This Court has never found one against employment, Your Honor. If we're going to stick with employment, there are none with respect to employment, zero.

QUESTION: But there are a number of other areas where there have been constitutional violations, but none in the age area.

MR. SUTTON: Well, I suspect, Your Honor, if we [26] reviewed all of the Court's constitutional findings there would be cases in which an elderly person was a plaintiff and won a constitutional case.

QUESTION: Yes, but not that it was unconstitutional to place the discrimination on the basis of that person's age.

MR. SUTTON: I think that's true, Your Honor, but I mean, if you can remedy constitutional violations in one area by transferring it to another area, then we really should talk about the entire ADA, and talk about its biggest flaw. Its biggest flaw that it is a section 5 – it is a constitutional amendment in section 5 clothing. It applies to every single form of Government service, and if

they're allowed to do this, they'll do it in every area, rational basis scrutiny of all sorts.

QUESTION: May I ask you if you think the congressional findings might have been phrased a little differently if they'd been made after the Seminole decision?

MR. SUTTON: It's certainly possible, Your Honor, and one of the best things I think that can be done here is, instead of the Court having to engage in this section 5 inquiry on the basis of the Government lawyers after the fact, let them do it again.

But I will suggest this, Your Honor. It is not [27] going to be as easy as one submits to say –

QUESTION: It seems to me you're suggesting that we treat the Congress of the United States as a trial court and remand the case to them to prepare better findings.

(Laughter.)

MR. SUTTON: No, Your Honor. No, Your Honor, not at all. The ADA would be invalid. 12202, section 12202 would be invalid, and it would be up to them to decide what they wanted to do. In fact, in City of Boerne this Court invalidated the RFRA. They're back at it again. They're entitled to do that.

I will submit that there is a bright line here. It's constitutional violations. U.S. Senators, U.S. House of Representatives Members are not going to lightly find States are violating the Constitution, but we want them to ask that question. That's the very point of section 5.

We want them to look out, root out this type of invidious discrimination, and if it's going on, have them ask the right question, identify it, and end it.

QUESTION: May I go back to the remedy question that Justice Ginsburg raised? Is it your position that with respect to the damages remedy that you zeroed in on, that that would fail the proportionality test unless the same remedy were applied to the National Government and to [28] private employers generally? Is that the position that you're taking?

MR. SUTTON: Your Honor, it certainly helps our case and it makes it a lot easier, but to be candid with you, if they imposed this same remedy on the Federal Government, I think they would still have problem, precisely because it applies to every Government service, but it just makes it –

QUESTION: Well, it may not be sufficient, but is it your position that it would be necessary to survive the proportionality –

MR. SUTTON: Not in this case, Your Honor. The breadth of coverage and the gap between the statutory and constitutional standards are enough in this case. If I could reserve the rest of my time for rebuttal.

QUESTION: Very well, Mr. Sutton.

MR. SUTTON: Thank you.

QUESTION: Mr. Gottesman, we'll hear from you.

ORAL ARGUMENT OF MICHAEL GOTTESMAN
ON BEHALF OF THE RESPONDENTS

MR. GOTTESMAN: Thank you, Mr. Chief Justice, and may it please the Court:

I want to begin by responding to what Mr. Sutton said in his opening, that the ADA rests securely on the [29] Commerce Clause. No State would ever challenge that, and so what's at issue here is quite narrow. Indeed, States are challenging in the lower courts the Commerce Clause predicate for title II of the ADA, and they are arguing that in light of this Court's decisions in Lopez and Morrison that so many State activities and programs are not commercial in character and, thus, cannot be reached by the Commerce Clause, so that were this Court to hold that the ADA is not proper Fourteenth Amendment legislation, there is significant danger that the ADA would be without a constitutional –

QUESTION: But has – Mr. Gottesman, has any court bought that argument? After all, there is the Garcia case to deal with, and –

MR. GOTTESMAN: So far there is one district court that has bought the argument, Pierce v. King, 918 F.Supp. 932. The issue is now pending in several courts of appeals on appeals by the State.

QUESTION: This would be an argument that could be made only by the State, not by a county or a city, I take it.

MR. GOTTESMAN: Well, no, because a county or a city – if you take the Fourteenth Amendment away, the Fourteenth Amendment argument – the Eleventh Amendment argument is available, of course, only to a State, but if [30] you say that the ADA is not grounded in the

Fourteenth Amendment and courts later hold that it is not grounded in the Commerce Clause, then it is not appropriate legislation directed to either, as we understand it.

QUESTION: I would think that if you lose the Commerce Clause challenge the least of your worries is the States. You're going to have many more businesses who employ people, that they're going to be exempt.

MR. GOTTESMAN: Well, except only – title II applies only to the States, and so it, losing title II is losing – I'm sorry. In that sense it applies to State and local governments, and if it goes down under the Commerce Clause then State and local governments will not be governed by title II.

QUESTION: Mr. Gottesman, I'm not sure that the record here presents much in the way of a title II claim. I know the Ninth Circuit has said that all employment disputes under the ADA are covered only by title I, not title II, that title II addresses public services, and I know the grant of certiorari covered both, ostensibly, because the plaintiffs' cause of action appeared to address both, and I think this Court probably hasn't decided whether all employment cases fall under title I, but if we thought they did, do we have to address the title II issue?

[31] MR. GOTTESMAN: Well, no. If you resolved in this case, although the question is not presented, the conflict among the circuits as to whether employment discrimination also violates title II, and if you decided, adversely to our position, that it does, the position we advanced in the lower courts, then yes, only title I would apply to employment, and only it would be at issue.

But we would hope that before this Court resolved that important issue that has divided the courts of appeals, that there would be an opportunity for briefing.

In this case, the petitioners never raised an objection to title II's application to employment, so it never became an issue in this case. Now, I want to turn to the merits of the Fourteenth Amendment argument and we want to suggest as a preliminary petitioners have never really acknowledged an important body of Fourteenth Amendment decisional law, which is that even when we're dealing with groups or classifications that are covered by the rational basis standard, it is irrational for a State to act with a purpose that is irrational.

A number of Supreme Court decisions have held that State action that rests on invidious prejudice, irrational fear, false stereotypes that have evolved from [32] those prejudices and fears, desires not to be discomforted by association with disfavored classes, patronization, if that's what actually motivates *a* State decision, that itself provides the irrationality which violates the Fourteenth Amendment.

QUESTION: And how does one usually determine that? I mean, I would usually consider it to be irrational and motivated by prejudice when there's no practical reason for it. Doesn't it boil down to the same thing? You look to see whether, indeed, there's a rational basis for what's been done. If there's no rational basis, you say it must be motivated by, you know, irrational prejudice or stereotyping, or whatever.

MR. GOTTESMAN: Well, surely it's the case that when we see that there could be no rational basis, that will fuel our conclusion.

QUESTION: I'm not sure it advances the ball. I think the two boil down to the same.

MR. GOTTESMAN: But the irrational purpose prong of Fourteenth Amendment jurisprudence is not limited only to those cases where it is irrational, where the decision itself would have to be irrational.

That is to say, it's a well-developed concept that a State may take an action where there could be some rational reason for the action, but we determined that [33] reason is a pretext –

QUESTION: I understand.

MR. GOTTESMAN: – that what really motivated them was hostility to the class.

QUESTION: I just don't know how you prove that, except by looking at whether there is, in fact, a rational basis. How do you prove that –

MR. GOTTESMAN: Well, that problem of proof, Your Honor, is precisely why Congress found the need to adopt prophylaxis here, and – but I want to, before I get to that, to lay out just what Congress –

QUESTION: That puts the cart before the horse. They have to have shown unconstitutional State action before they can use the prophylaxis.

MR. GOTTESMAN: Correct, so –

QUESTION: And you're saying the unconstitutional State action is going to be based upon not the realities out there, whether there was a rational basis, but whether, even though there was a rational basis, the States somehow were acting out of irrational hatred of the disabled. How do you establish that?

MR. GOTTESMAN: Well –

QUESTION: Did Congress establish it?

MR. GOTTESMAN: Yes, it did.

QUESTION: Tell me how.

[34] MR. GOTTESMAN: What it did was find that these kinds of motivated actions are widespread. Let's just –

QUESTION: I didn't catch the last word, Mr. – are what?

MR. GOTTESMAN: Widespread.

QUESTION: Widespread.

MR. GOTTESMAN: Pervasive was their word. What they said in the findings on the face of this statute is that there is pervasive prejudice, still, today, or still in 1990, when they enacted this statute, there is pervasive prejudice against persons with disabilities, a history of purposeful unequal treatment, outright intentional exclusion, stereotypical assumptions that are wholly false and linked to prejudice, and they said these animuses, or animi, have been aimed at a group which has been historically disfavored and which constitutes a discrete and insular minority.

There is a we they way in which people think about persons –

QUESTION: That proves that prejudice exists. Does it prove that State action has been taken on the basis of that prejudice when there is rational basis for the State action?

MR. GOTTESMAN: Yes, because Congress went through enormous volumes of material that showed that [35] State action had been taken on the basis of that prejudice.

QUESTION: Let's not talk about State action for a minute, Mr. Gottesman. Let's talk about the States and the Eleventh Amendment section. What findings did Congress make, what examples did it use to tie in the States with this sort of irrational discrimination?

MR. GOTTESMAN: Fair enough, Your Honor. Here, I will talk only about States and only about employment, because that is the narrowest focus. As the Government's brief shows, there was an enormous volume of State discrimination across wide sectors, really everywhere, which is not surprising if you accept the premise that there are pervasive, widely held prevalent views that stigmatize and disadvantage persons with disabilities.

QUESTION: Now, when you say discrimination in answer to this question, you mean –

MR. GOTTESMAN: Fourteenth Amendment –

QUESTION: – unconstitutional –

MR. GOTTESMAN: Correct.

QUESTION: Unconstitutional action.

MR. GOTTESMAN: Correct. Congress had two – three kinds of evidence. Number 1, it had individual incidents, and it had them in substantial number.

[36] QUESTION: By people who were acting for the State?

MR. GOTTESMAN: Yes. I'll give you – here's a couple of examples. A woman crippled by arthritis is denied a job as a teacher in a university because they don't want the students to have to look at her. That is prejudice of a kind that would violate the Fourteenth Amendment.

QUESTION: What was the basis for that finding?

MR. GOTTESMAN: Testimony of the teacher.

QUESTION: Was there – of the teacher?

MR. GOTTESMAN: Yes.

QUESTION: Was there any testimony on the other side?

MR. GOTTESMAN: No, because the State –

QUESTION: Just hear one side and make a finding?

MR. GOTTESMAN: Well, the States were – the States spoke about this statute. They spoke in favor of this statute. The States told Congress, a) we have this problem, and b) State laws are inadequate to deal with it. That's why we support the enactment of this statute. We need the remedies.

QUESTION: One witness who says, the reason I didn't get promoted was my arthritis, and Congress says [37] State – unconsitutional state discrimination.

MR. GOTTESMAN: There are hundreds of these,

Your Honor, not one, hundreds. But broader than that – if Your Honor wants, I'll give you some more. A microfilmer at the Kansas Department of Transportation is fired, and he is told, the reason you are being fired is that we have now discovered that you have epilepsy. He has throughout his tenure there been performing above the standards required for employment there. Now, Your Honor can say –

QUESTION: That is unconstitutional discrimination?

MR. GOTTESMAN: Yes.

QUESTION: That is irrational discrimination?

MR. GOTTESMAN: Yes.

QUESTION: Whether it's good or bad –

MR. GOTTESMAN: Yes.

QUESTION: – maybe it shouldn't exist, but you think there is no rational basis.

MR. GOTTESMAN: That is correct, and Congress thought that –

QUESTION: On the facts of this case, could the plaintiffs have gone to a court of competent jurisdiction and established an equal protection violation?

MR. GOTTESMAN: They could if they could prove [38] the motivation. They would have to prove the motivation.

They would have the burden of proving the motivation, but yes, if Pat Garrett was demoted from her position as director of nursing because of some antipathy on the part of the person who made that decision, or some irrational, erroneous stereotype, that would be a case –

QUESTION: Are there cases in the State courts, or in the lower Federal courts which have accepted this rationale?

MR. GOTTESMAN: Well, there are cases – because of the prior existence of section 504, we've cited in our briefs some cases that were brought. Understandably courts don't reach constitutional questions, so they can find it violates the statute, but the findings made in those cases are that employees were denied jobs out of irrational antipathy.

QUESTION: But if this is so evidently an equal protection violation, why haven't courts for the last 30, 40, 50 years routinely entertained these challenges and given relief?

MR. GOTTESMAN: Because it is the burden on the plaintiffs – first of all there have not been that many cases – we – let me back up for a minute. We would not expect to see reported decisions of that. If a plaintiff comes in and has the kind of evidence that would win an [39] Equal Protection Clause, the odds are that case is going to get resolved before you ever see a –

QUESTION: You're telling me that over the last 30 or 40 or 50 years there have been numerous cases in the courts where handicapped and disabled people have routinely made equal protection claims and prevailed?

MR. GOTTESMAN: No, that they have made claims and have prevailed under section 504, with the court not reaching, as it should not reach, a constitutional question if it finds that the statute was violated, but I –

QUESTION: Mr. Gottesman, what are your other two arguments? You had three, I believe.

MR. GOTTESMAN: Yes, the three prongs. One was the individual cases. Second is the studies. Congress had a number of studies of State employment. They're all cited in our brief. One of those studies was performed by a congressionally created committee, the Advisory Committee on Intergovernmental Relations, whose very function was to police whether Congress was overregulating the States, unnecessarily regulating the States. Its membership consisted predominantly of State and local governmental officials, and it submitted a report to every Member of Congress while the ADA was under consideration recounting the findings of its own inquiries [40] of State officials in which it asked State officials, can you explain why there is such a low percentage of persons with disabilities working for you?

And overwhelmingly those State officials responded, yes, the problem is that middle managers, the people who make these kinds of decisions, the personnel decisions in our State, are afflicted with negative attitudes about persons with disabilities, discomfort about working among

them, myths and stereotypes about the incapacity of people with disabilities to perform jobs, things that have been – and the report goes on to say this. Empirical studies over and over and over again have shown that these myths are false, that there is not a higher turnover rate among persons with disabilities.

QUESTION: Were these findings by Congress?

MR. GOTTESMAN: Yes. Congress – you say are these findings by Congress. Congress made extensive findings that these things are true, that all of these things are animating decisions.

QUESTION: This report that you're now describing was a report made to Congress by –

MR. GOTTESMAN: That's correct. This was a report to Congress, and we cite six other reports by various – many of them conducted by the States themselves, saying we have a terrible problem. Our [41] supervisors have qualms about hiring people with disabilities. They're uncomfortable with it. So that's the second body of evidence, and the third body of evidence is the evidence that Congress had about the reality of the psychological attitudes in our society about people with disabilities. In accommodating the spectrum, which was the report of the Civil Rights Commission, they relied upon extensive bodies of professional evidence that showed that there were four crippling attitudes that many people in our society have about people with disabilities.

They are discomforted about being around them. They have stigmatic attitudes about them. They think

they are inferior, less than normal human beings, that they hold all kinds of erroneous stereotypes about them, that cancer is contagious, that epilepsy –

QUESTION: Do you think it is proper to leap from these general psychological generalizations about the society at large, and State employers in particular, to the conclusion that the States have been acting unconstitutionally?

MR. GOTTESMAN: My light is on, Your Honor.

QUESTION: You may answer, Mr. Gottesman, briefly.

MR. GOTTESMAN: The point is that –

[42] QUESTION: The answer is yes.

MR. GOTTESMAN: No, the answer is –

(Laughter.)

MR. GOTTESMAN: No, the answer is, they have all three together. It's not just, should we rely on psychiatrists. We have the evidence of what actually is happening. We have the acknowledgements of the State in these studies, and we have the understanding of why this is happening from the psychological studies.

QUESTION: Thank you, Mr. Gottesman. General Waxman, we'll hear from you.

ORAL ARGUMENT OF SETH P. WAXMAN ON BEHALF OF THE UNITED STATES

GENERAL WAXMAN: Mr. Chief Justice, and may it please the Court:

The question was – reference was made to the caption in the Senate report, and it also appears in the House report, of Congress' conclusion that the State remedies were inadequate, a conclusion that was also supported by the 50 State Governors' committees that examined this issue, and the question I think that Justice Scalia asked was, inadequate to do what, because that, after all, is the issue.

Now, this is a case where a statute was enacted before Seminole Tribe and before Boerne, and therefore the [43] paradigm that this Court has created for the words, the precise magic words that we would now expect Congress to use didn't – can't, I think, fairly be imposed on a coordinate branch of Government.

But the answer, Justice Scalia, to the question, I think, is determined by reference to what the legislative record before Congress, not only when it conducted its eighteen hearings and amassed seven separate complete reports in enacting the ADA, but also when it investigated the problems that led it to create the CRIPA statute, the Constitutional Rights of Institutionalized Persons, and IDEA, and others, but looking just – looking –

QUESTION: But General Waxman, it's not magic words. The whole point of City of Boerne is that when Congress alters the Federal balance it must consider very carefully the consequences of doing so, and to say that it's simply magic words does not do justice or respect to that very fundamental principle, and the Federal –

GENERAL WAXMAN: I absolutely –

QUESTION: And the Federal balance is altered far more under the Fourteenth Amendment than it is under the Commerce Clause.

GENERAL WAXMAN: Justice Kennedy, I agree, and I would say therefore that the question fairly put is [44] whether the Disabilities Act sweeps more broadly than Congress could reasonably have deemed necessary to remedy and prevent the constitutional problem it found applying this Court's definition of the standard, and what it found were four things.

It found, first, that there is pervasive and widespread discrimination against the disabled, which is often the product of hostility, overbroad and irrational stereotypes, and deliberate selective indifference, the hallmarks of unconstitutional intent.

QUESTION: General Waxman, do you agree with Mr. Gottesman that if the – supposing there emerged a 55-year retirement law, rational basis, relied on in Kimel, do you agree with Mr. Gottesman's suggestion that if a court could be persuaded that when the legislature acted, that they really had it in for people over 55, that that would be invalid?

GENERAL WAXMAN: No, I – well, I don't think a court would – a court would not find that invalid, applying a rational basis standard, because this Court has had – has held that under rational basis review of legislation one looks at whether there is a conceivable rational basis that would support a distinction, and that, in fact –

QUESTION: Well, but now, I don't want to put [45] words in Mr. Gottesman's mouth, but I understood him

to say that sure, rational basis, but if you could prove that although there was a rational basis for requiring people to retire at 55, if the legislature that enacted that had really been motivated by a dislike for people over 55, then it would – there would be a violation of equal protection.

GENERAL WAXMAN: Well, Justice – Mr. Chief Justice, this Court has made clear that as a paradigm of –

QUESTION: Are you in the process of answering my question?

(Laughter.)

GENERAL WAXMAN: Was – if your question was whether I also understood Mr. Gottesman to say that, I –

(Laughter.)

QUESTION: No, no, no.

(Laughter.)

QUESTION: Do you agree with Mr. Gottesman?

GENERAL WAXMAN: I do not agree that a legislature that could have had a – a legislature that could have had a rational reason for doing something which, in fact, was motivated by invidious discrimination would be struck down if this Court applied rational basis review, but Cleburne, it seems to me, and the other cases [46] in which this Court has dealt with and remarked on discrimination against the disabled points the way to the correct resolution of this case, and before I – I do want to address that, but first I'll finish –

QUESTION: Well, do you think it provided rational basis as the foundation of review in Cleburne?

GENERAL WAXMAN: In Cleburne –

QUESTION: Or something more?

GENERAL WAXMAN: Well, there is a great debate about the answer to that question, but I will answer the question on the assumption that the Court in fact applied rational basis review, but what the Court explained was that rational basis review is contextual, and context, just like applying the proportionate and congruence test, is contextual, and it requires a reference to the historical context in which it arises. And what this Court said in Cleburne is, we are not going to look first at the facial constitutionality or unconstitutionality of this statute. We're going to require, in the unique context of a history of pervasive invidious discrimination against the disabled, what this municipality's reasons were. And having looked at that, it concluded that the – that it must have been motivated by an invidious intent, because the proferred reasons were not, in fact, rational.

[47] Now, Cleburne, in the context of many other cases in which this Court and Justices of this Court have remarked on the history of pervasive invidious discrimination against the disabled, provided – essentially gave Congress the blueprint in which it acted in this case, and here's why.

QUESTION: Do you think Congress can by law establish that the disabled are a discrete minority entitled to heightened scrutiny in reviewing legislation, or action by States?

GENERAL WAXMAN: Our argument doesn't depend on it, but I think the answer from Cleburne is yes, because in Cleburne what this Court said – and I don't have the exact words in front of me – was that because discrimination against the disabled is such a complicated issue, that is, because there are reasons why differential treatment is sometimes permitted and, indeed, perhaps the Constitution sometimes requires it, that we have to give broad deference to the legislatures, and we have to let legislatures deal, as they more competently can, with this difficult problem, unless –

QUESTION: We said the same thing in Kimel. We said, rational basis scrutiny, much legislative latitude.

GENERAL WAXMAN: Yes, Mr. Chief Justice, but what this Court said in Cleburne is, because of that [48] unique history, absent congressional direction, we will apply, as a paradigm of judicial restraint, rational basis review.

QUESTION: Well, but – I'll reread Cleburne, but Cleburne said that in order to defer to the authority of the legislature to pass a zoning law, that did not have to do with the authority of the legislature to declare a suspect class.

GENERAL WAXMAN: That –

QUESTION: That's quite different.

GENERAL WAXMAN: And I'm not suggesting to the contrary, Justice Kennedy. I was responding to Justice O'Connor's question about whether a legislature could instruct a court to apply a different level of scrutiny, and the language in Cleburne that says access –

QUESTION: And you think Congress can do that?

GENERAL WAXMAN: We – I believe, as Cleburne says, absent congressional direction we apply rational basis for review.

QUESTION: But I persist in the point that that did not address Congress' authority and scope and prerogatives under section 5 of the Fourteenth Amendment.

That's quite different.

GENERAL WAXMAN: I agree that that's not necessarily the case, but if I can simply point out, [49] Justice Kennedy – this actually does go back to Justice Scalia's original question – that not only was – I mean, it is important, it is critical here to understand that not only does the Congress find a massive record of discrimination based on states of mind that are the hallmarks of constitutional intent, but also that this discrimination is the legacy of a not-too-distant past in which Government practices deliberately isolated, segregated, and withheld from the disabled fundamental rights and the chance to participate in mainstream life. When Justice Marshall wrote, in his separate opinion in Cleburne, a statement that no Justice contradicted, that a regime of State-mandated segregation and degradation that in its virulence and bigotry rivaled and, indeed, paralleled the worst excesses of Jim Crow –

QUESTION: Well now, General Waxman, are we then to look through separate opinions, dissenting opinions, and say if the majority didn't contradict them they must have been subscribed to by the whole Court? We've never done that.

GENERAL WAXMAN: Not at all, Justice –

QUESTION: I'm surprised that you would simply cite an opinion like that, as if – unless the majority said, gee, we don't agree with that statement, it suggests the majority did agree with it.

[50] GENERAL WAXMAN: Mr. Chief Justice, the point I'm making is more broadly that Congress itself had before it a record not only of what was going on currently, but what had produced it. The Civil Rights Commission prepared a report –

QUESTION: What you were citing was Justice Marshall's opinion, and are you saying that Congress could rely on that?

GENERAL WAXMAN: I'm – as an observation of historical fact, Congress could certainly rely on it, and he was not the only one in Cleburne to make that observation. Justice Stevens, writing for himself and the Chief Justice, said that through ignorance and prejudice the mentally retarded have been subjected to a history of unfair and often grotesque mistreatment.

QUESTION: Well then, one – Congress could make its record, I take it, out of statements in dissenting opinions from this Court.

QUESTION: I have to write more dissents and concurring opinions, I guess, if I want to be really influential.

(Laughter.)

GENERAL WAXMAN: Mr. Chief Justice, so that I am not – I don't want to be misunderstood. This is not an – I'm using the – Justice Marshall's categorization [51]

because I think it well-reflects the evidence that Congress itself heard. The Civil Rights Commission report accommodating the spectrum which was submitted to Congress at its request details at great length, and was decided – and was issued before Cleburne, the history of State-sponsored intentional, pervasive isolation and segregation and –

QUESTION: Unconstitutional. Did they use the words –

GENERAL WAXMAN: Yes.

QUESTION: – unconstitutional?

GENERAL WAXMAN: Yes. Forced – yes, it does. Forced sterilization, refusal to allow –

QUESTION: What does? What does?

GENERAL WAXMAN: The –

QUESTION: The congressional findings here?

GENERAL WAXMAN: The Civil Rights Commission report uses the word, unconstitutional, but whether it does or not, the practices – I don't think anybody – I don't think that Mr. Sutton would conclude that the historical practices – and I'm not suggesting they persist, but we're talking here about a section 5 authority not only to deal with a pervasive current problem, but to remedy the effects of past intentional unconstitutional discrimination.

[52] The remedy for past segregation and isolation is integration, and that explains in part why the Disabilities Act admittedly reaches some conduct that a court applying rational basis review would not deem unconstitutional. It's both. It's that –

QUESTION: Mr. Waxman, is it really rational basis review? I mean, Cleburne does – the result seems at odds with the – with just anything goes, which had been what rational basis meant.

I thought that the Cleburne decision was very much like Reed v. Reed in the gender area. That is, the Court purported to apply rational basis, but came to a result that didn't square with any prior rational basis decision.

GENERAL WAXMAN: The one thing one can certainly say, whatever words one uses, and Justice Stevens in his concurrence in Cleburne, as I recall it, basically says, I don't really know whether we have three distinct typologies. I consider all of this rational basis review. It just depends on how high the justification is and how great the reason there is to suspect that something unconstitutional may be going on. But it is clear that what Cleburne did was, in looking at the actual administrative bureaucratic decision, as opposed to the legislative choice, require an [53] articulation of the actual reasons in the context of alleged discrimination in this unique historical area. And what Congress did essentially was to generalize what this Court did in Cleburne. It took this Court's specific inquiry in Cleburne in the light of the Court, many instances in which the majority of this Court has remarked about the history of discrimination in Choate, Alexander v. Choate and other cases, and it applied it to what Congress had in front of it, which was on the one hand a body of half-a-dozen or a dozen comprehensive studies detailing a widespread problem and historic unconstitutional practices, and over 5,000 narrative accounts that the congressional task force accumulated of individual instances of discrimination against

the handicapped, 600 of which addressed State or local governments which for purposes of the Fourteenth Amendment and State action have to be considered as one.

QUESTION: What about judicial findings, a question posed to your colleague. One would really have expected, if this was a massive constitutional problem, that there would have been a large number of cases that had found the States guilty of unconstitutional action.

GENERAL WAXMAN: May I –

QUESTION: Yes.

GENERAL WAXMAN: May I answer?

[54] QUESTION: Yes.

GENERAL WAXMAN: At footnote 11 in our brief we cite some of those decisions but, as this Court recognized in Watson v. Forth Worth Bank & Trust there are many, many instances in which subconscious attitudes and prejudices cannot be proved to a judicial exactitude. Thank you very much.

QUESTION: Thank you, General Waxman. Mr. Sutton, you have 5 minutes remaining.

REBUTTAL ARGUMENT OF JEFFREY S. SUTTON ON BEHALF OF THE PETITIONERS

MR. SUTTON: Three brief points, Your Honor. I certainly hope City of Cleburne applied rational basis, because if it didn't the ADA has many constitutional problems.

If the – if in the area of discrimination against the disabled you apply heightened review, just consider the very problem of defining who is disabled and who is not under the law. You're going to have underinclusiveness and overinclusiveness problems that would never survive heightened review, so let's hope it's rational basis scrutiny. That was the very point of the law.

Second, I've not heard anything today from the other side –

[55] QUESTION: And how do you explain the results? I mean, one could conceive of many bases that would uphold that zoning provision, and yet the court not only didn't attempt to justify the legislation, but held the legislation to a rather stringent burden of justification.

MR. SUTTON: Your Honor, I would disagree respectfully. When a Government lawyer comes before a court, whether at the trial level or this Court, and offers five explanations for a law that they all say are rational, it turns out they're not, they're irrational and driven by animus, they lose.

QUESTION: I thought under classic rational basis review the court was not only to listen to the Government's argument, but if there's any basis it could conceive – and surely there were bases that could be conceived –

MR. SUTTON: I –

QUESTION: – that were not driven by animus –

MR. SUTTON: To be honest with you, I've never – I'm not aware that that is the Court's rule, that the

Court's job is to conceive of rational basis. I always thought that was the job of the Government lawyer to come before the court – the inquiry is not exactly what the Government did. It's whether there's any rational explanation after the fact.

[56] And, as this Court's decisions prove, there are probably a dozen to two dozen of them. There are some instances where they can't come up with anything, and that's exactly what happened there. Whether it was good lawyering, bad lawyering, the end result, everything they identified was not rational.

The second thing, I've not heard anything from the Government or the private respondents in their briefs or today about the second half of the City of Boerne inquiry. There's nothing about proportionality and, as the Court said in Kimel, Florida Prepaid, and City of Boerne itself, the issue on proportionality is whether the statutory standard covers, quote, substantially more conduct than would be found unconstitutional. That itself invalidates this law.

Now, the question of discrimination, whether it exists at the society or the Government level, I think this Court's decisions from 1985, one of them written, by the way, by Justice Marshall in Alexander v. Choate, Justice Marshall says in a 9-0 decision, the main problem with disability discrimination is not one of intent. It's one of either trying too hard, needless paternalism, or not trying hard enough, unintentional neglect. That's the problem.

That's an Article I problem, and we're happy the [57] ADA was enacted. The only challenges that have been made to it to our knowledge are in the prison setting, and

it's about inmates and, if there's one area where maybe interstate commerce doesn't go, it's to a prison, where the very point of a prison is to keep people out of interstate commerce, so –

(Laughter.)

MR. SUTTON: And I don't think that's a very good example.

Unless there are any other questions –

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Sutton.

QUESTION: Well, if you have a minute, I would like to go back to equal protection of the law. Equal protection of the law might be violated where a State official has a bad reason for doing something, though he might have a good one. As you point out, a court probably wouldn't catch that violation, because a court has to apply a rational basis test, but that's for institutional reasons, so why should we apply such a test where the institution is Congress? So do you see what I'm – I'm trying to get –

MR. SUTTON: I understand exactly what you're saying, Your Honor.

QUESTION: Yes.

MR. SUTTON: But to apply the test you're [58] suggesting is one that requires the overruling of City of Boerne. The very point of City of Boerne –

QUESTION: City of Boerne, if I find City of Boerne ambiguous on this point, on the point of whether it's

going to – whether a court would find a violation, or whether there is a violation, if I find it ambiguous on that point, can't I pre-crank in my institutional considerations?

MR. SUTTON: No, Your Honor. I would suggest that's just the power to use section 5 to redefine section 1, and that is what City of Boerne says, and that's what Kimel says, also a rational basis case. But at the most, Your Honor, if you're going to talk about individual decisions by Government officials, that's why you need a pattern and practice. It's a very big distinction between individual officials doing something and State laws that discriminate invidiously. That's the Voting Rights Act cases, versus City of Boerne, versus Kimel.

Thank you, Your Honor.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Sutton.

The case is submitted.

(Whereupon, at 11:03 a.m., the case in the above-entitled matter was submitted.)